Applicant Details

First Name	**Brandon**
Middle Initial	**T**
Last Name	**Goldstein**
Citizenship Status	**U. S. Citizen**
Email Address	**btgoldstein@wm.edu**
Address	**Address** Street **702 Glynn Springs Dr** City **Williamsburg** State/Territory **Virginia** Zip **23188** Country **United States**
Contact Phone Number	**3019560543**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2018**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 25, 2022**
Class Rank	**Below 50%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Bill of Rights Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Allen, David
david.allen@3rdcc.org
3137790056
Luedtke, Dawn
dawn.luedtke@maryland.gov
Devins, Neal E.
nedevi@wm.edu
757-221-3845

References

1. The Honorable Matthew F. Leitman
matthew_leitman@mied.uscourts.gov
Chambers Phone: (313) 234-5125

2. The Honorable David J. Allen
david.allen@3rdcc.org
Chambers Phone: (313) 224-0250

3. Professor Neal E. Devins
nedevi@wm.edu
Office Phone: (757) 221-3845

4. Dawn Luedtke
dawn.luedtke@maryland.gov
Office Phone: (410) 404-2212

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brandon T. Goldstein
702 Glynn Springs Dr
Williamsburg, VA 23188
(301) 956-0543
btgoldstein@wm.edu

April 13, 2022

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year student at William & Mary Law School and former University of Virginia student-athlete seeking a clerkship position for the 2022-2023 term. Through my work with Wayne County Circuit Judge David Allen and U.S. District Judge Matthew Leitman, my Master of Public Policy program, and vast array of other practical experiences throughout law school, I have developed unique skills and perspectives that will make me an exceptional law clerk.

As an undergraduate and graduate student-athlete at UVA, I thrived in a demanding environment that required my best performance in multiple areas simultaneously. During my time there, I consistently improved my ability to excel in each, deftly managing my time to earn spots on the Dean's List and the Atlantic Coast Conference Honor Roll. Through my academic programs, I built expansive analytical capabilities. My Master of Public Policy program thrust me into complex real-world predicaments, where I quickly learned the importance of projecting the practical effects of my decisions. I deeply engaged issues of national security policy, federal and state budgetary policy, civil rights policy, and electoral policy. During my capstone project, I collaborated with the U.S. Department of Commerce to create an array of solutions to a persistent challenge in U.S. trade policy. I presented my recommendation in a written report and orally to representatives from the Department of Commerce.

In my first year of law school, I sharpened my research, writing, and advocacy skills through William & Mary's Legal Practice Program. I learned how to conduct targeted legal research and write using a wide variety of print and online sources. Through my second year, I developed, researched, and wrote a student note challenging the current voting rights paradigm, and the outgoing article selection committee of the *William & Mary Bill of Rights Journal* selected my note for publication in Volume 30 out of thirty-six student-written submissions. The outgoing executive board further selected me to serve as Executive Articles Editor, whereby I directed our article selection committee as we filled our pages. Most significantly, externing with Judge Allen afforded me multiple opportunities to hone my legal research and writing skills. He placed early responsibility with me to draft full opinions applying doctrine to cases covering a wide array of unfamiliar subjects. He published my first two opinions with minimal alteration, and asked me to continue working with him to help decide and write the opinion for a case between General Motors and Chrysler.

Thank you for your consideration. I am excited to speak with you further regarding my skills and qualifications for a clerkship. I look forward to hearing from you.

Sincerely,

Brandon T. Goldstein

Brandon T. Goldstein

530 Market St E
Gaithersburg, MD 20878
btgoldstein@wm.edu

702 Glynn Springs Dr
Williamsburg, VA 23188
(301) 956 - 0543

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, Political & Government Law, May 2022
G.P.A.: 3.2

- **Executive Articles Editor, *William & Mary Bill of Rights Journal*, Vol. 30**
- Associate Justice, University-Wide Honor and Student Conduct Appeals Board, 2020 – 2022
- Member: American Constitution Society, Election Law Society, Barristers Softball Council

University of Virginia, Charlottesville, Virginia
M.P.P., National Security & Foreign Policy, Governance & Democracy, May 2019
B.A., American Government and Politics, May 2018

- University of Virginia Men's Varsity Swimming, 2015-2019
- Dean's List, Atlantic Coast Conference Academic Honor Roll

PUBLICATIONS

Note, *Maybe We Don't Need to Find Waldo After All: Why Preventing Voter Fraud Is Not a Compelling Interest*, 30 WM. & MARY BILL RTS. J. __ (forthcoming 2022).

EXPERIENCE

The Honorable Matthew F. Leitman, U.S. District Court, Eastern District of Michigan — Detroit, Michigan
Judicial Extern (Remote) — January 2022 – Present

- Facilitate Judge Leitman's decisions by preparing and presenting legal research for dispositive issues
- Prepare Judge Leitman for motion hearings by reviewing and summarizing pleadings, motions, and briefs

The Honorable David J. Allen, Third Judicial Circuit of Michigan — Detroit, Michigan
Judicial Extern (Remote) — January 2021 – January 2022

- Drafted three full opinions for Judge Allen, including an opinion featured as a cover story in *Michigan Lawyers Weekly* and a decision in a case between General Motors and Fiat-Chrysler

Lawyers' Committee for Civil Rights Under Law — Washington, D.C.
Public Policy & Legal Extern — August – December 2021

- Served as interim liaison to the Fair Courts and Voting Rights Task Forces, two coalitions of civil rights groups focused on judicial appointments, civil rights litigation, and passing voting rights legislation
- Edited written testimony for the President's Supreme Court Reform Commission and Congressional hearings
- Drafted memoranda and policy briefs based on analysis of proposed bills and recent court decisions

Maryland Office of the Attorney General, K-12 Education Division — Baltimore, Maryland
Summer Law Clerk — May – August 2021

- Proposed language to the Lieutenant Governor's Commission on Mental & Behavioral Health for new regulations or statutes guiding implementation of the state's involuntary commitment standards
- Suggested changes adopted in the 2021 update to Maryland's Model Policy for Behavioral Threat Assessment
- Drafted opinions for two administrative appeals to the Maryland State Board of Education

William & Mary Law School, Professor Neal Devins — Williamsburg, Virginia
Constitutional Law Research Assistant — May 2020 – Present

- Cited in NYU Law Review article for analysis concluding the U.S. Courts of Appeals started taking politically charged cases *en banc* more frequently

COMMUNITY SERVICE

Virginia Department of Elections, *Election Officer*, James City County, VA
Special Olympics, *Volunteer*, Washington, D.C. and Charlottesville, VA
Habitat for Humanity, *Volunteer*, New Orleans, LA
Kids Enjoy Exercise Now (KEEN), *Volunteer*, Montgomery County, MD
Lakelands Lionfish Community Swim Team, *Assistant Coach*, Gaithersburg, MD

WILLIAM & MARY LAW SCHOOL
OFFICE OF CAREER SERVICES

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

COVID-19 PANDEMIC: GRADES FOR THE SPRING 2020 TERM

In response to disruption caused by the global COVID-19 pandemic, the William & Mary Law School faculty voted to require that every course taught at the Law School during the Spring 2020 term be graded Pass/Fail. This change to Pass/Fail grading for the Spring 2020 term impacts members of our Classes of 2020, 2021, and 2022. Please note that "Pass" grades in courses graded on a Pass/Fail basis do not affect a student's GPA. As a result, class ranks for the Classes of 2020 and 2021 were not re-calculated following the Spring 2020 term, and the Class of 2022 received their initial ranking only after the Fall 2020 term.

Transcript Data

STUDENT INFORMATION

Name : Brandon T. Goldstein

Curriculum Information

Current Program
Juris Doctor
College: School of Law
Major and Department: Law, Law
Major Concentration: Political Law

***Transcript type:WEB is NOT Official ***

DEGREES AWARDED

Applied: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: School of Law

Major: Law

Major Concentration: Political Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	78.000	78.000	78.000	46.000	145.00	3.15

INSTITUTION CREDIT -Top-

Term: Fall 2019

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	B+	4.000	13.20	
LAW	102	LW	Civil Procedure	A-	4.000	14.80	
LAW	107	LW	Torts	B	4.000	12.00	
LAW	130	LW	Legal Research & Writing I	B+	2.000	6.60	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	46.60	3.32
Cumulative:	15.000	15.000	15.000	14.000	46.60	3.32

Unofficial Transcript

Term: Spring 2020

Term Comments: Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to choose ordinary letter grades.

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	P	4.000	0.00	
LAW	109	LW	Constitutional Law	P	4.000	0.00	
LAW	110	LW	Contracts	P	4.000	0.00	
LAW	132	LW	Legal Research & Writing II	P	2.000	0.00	
LAW	133	LW	Lawyering Skills II	P	2.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	0.000	0.00	0.00
Cumulative:	31.000	31.000	31.000	14.000	46.60	3.32

Unofficial Transcript

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	B-	2.000	5.40	
LAW	303	LW	Corporations I	B-	3.000	8.10	
LAW	400	LW	First Amend-Free Speech & Pres	B-	3.000	8.10	
LAW	465	LW	Copyright Law	B	3.000	9.00	
LAW	477	LW	Section 1983 Litigation	A-	3.000	11.10	
LAW	761	LW	W&M Bill of Rights Journal	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	41.70	2.97
Cumulative:	46.000	46.000	46.000	28.000	88.30	3.15

Unofficial Transcript

Term: Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	140A	LW	Adv Writing&Practice:Appellate	B+	2.000	6.60	
LAW	301	LW	ElecLaw Prac-LawyeringCampaign	P	1.000	0.00	
LAW	322	LW	State & Local Taxation	B	3.000	9.00	
LAW	348	LW	Privacy Law	B+	3.000	9.90	
LAW	485	LW	Immigration Law	B	3.000	9.00	
LAW	754	LW	Judicial Externship	P	3.000	0.00	
LAW	761	LW	W&M Bill of Rights Journal	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	11.000	34.50	3.13
Cumulative:	62.000	62.000	62.000	39.000	122.80	3.14

Unofficial Transcript

Term: Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	398	LW	Election Law	B	3.000	9.00	
LAW	421	LW	Voting Rights Litigation&Prac	P	1.000	0.00	
LAW	422	LW	Accting & Finance for Lawyers	B+	2.000	6.60	
LAW	452	LW	Employment Discrimination	P	3.000	0.00	
LAW	619	LW	Supreme Court Seminar	B+	2.000	6.60	
LAW	749	LW	Non-Profit Organztn Externship	P	3.000	0.00	

LAW	761	LW	W&M Bill of Rights Journal		P	2.000	0.00

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	7.000	22.20	3.17
Cumulative:	78.000	78.000	78.000	46.000	145.00	3.15

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	78.000	78.000	78.000	46.000	145.00	3.15
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	78.000	78.000	78.000	46.000	145.00	3.15

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Spring 2022

Subject	Course	Level	Title	Credit Hours
LAW	361	LW	Adv Legal Analysis & Doctrine	3.000
LAW	401	LW	Crim Proc I (Investigation)	3.000
LAW	429	LW	State & Local Government Law	3.000
LAW	453	LW	Administrative Law	3.000
LAW	585	LW	Advanced Legal Research	2.000
LAW	761	LW	W&M Bill of Rights Journal	2.000

Unofficial Transcript

THIRD JUDICIAL CIRCUIT OF MICHIGAN

DAVID J. ALLEN
CIRCUIT COURT JUDGE

907 COLEMAN A. YOUNG MUNICIPAL CENTER
DETROIT, MICHIGAN 48226-3413

(313) 224-0250
E-mail: David.Allen@3rdcc.org

July 2, 2021

RE: Letter of Recommendation for Mr. Brandon Goldstein

Dear Colleague:

It is my privilege to write this letter of recommendation in support of Mr. Brandon Goldstein. I have been a trial judge in Wayne County, Michigan for eighteen years, first in the criminal division, and now in the civil division. Among the 100 plus interns that I have supervised during my tenure, Brandon is an exceptional young man who has demonstrated both impressive competence and character, especially during these recent challenging times.

Brandon assumed an exceptional level of responsibility from the moment he began his internship in January. As his first assignment, I asked him to draft the opinion for a complex employment discrimination case that had been on my docket for over two years. Given the parties' posturing, I asked Brandon to write a more thorough and detailed opinion in anticipation of an appeal. He did not disappoint. Brandon left no stone unturned in reaching the correct legal and factual conclusions, checking every case and footnote to ensure the veracity of each party's assertions about the law before proceeding to do his own research to decide between the competing lines of cases. As he was finishing his first opinion, he proactively asked to be assigned another, and on this second assignment, he raised the bar even further. In deciding a multiyear dispute over an insurance coverage provision, he realized that although the insurance company's case law was valid and controlling regarding their denial of coverage, the actual language of the insurance policy did not match the case law, creating an ambiguity within the policy that did not exist in the case law. He then construed that ambiguity in favor of the policy holder as required by Michigan law. It is because of his exemplary abilities that I assigned him an extremely complicated matter involving General Motors and FCA. This case involves some of the best law firms and attorneys in the country and has global implications for the automotive industry. I would rarely assign such a complex matter to an intern, but Brandon proved himself capable of not only meeting the challenge but rising much above it.

Beyond his ability to research complex and unfamiliar areas of the law, Brandon stands as one of the finest writers to grace my courtroom during my tenure on the bench. It was a joy to follow his prose and train of thought. The clarity of his writing puts on clear display his unique ability to synthesize all of the complex information he compiled in his research, construct an airtight legal argument, and communicate it effectively. There were truly no loose ends for me to tie up in his work before publishing the opinions.

Additionally, it is clear that Brandon was raised right and educated at the finest institutions. He exemplified a can-do attitude from day one, approaching every challenge I threw his way with both tenacity and intellectual curiosity. His work ethic, honed over years as an NCAA Division I swimmer, is equally impressive. Parallel to his work with

me, Brandon simultaneously completed a demanding course load at one of the nation's premier law schools, began leading his law journal's article selection process as Executive Articles Editor, and penned his own law journal article that was selected for publication. In all, he brings a level of professionalism more befitting of an attorney with several years in the practice. I strongly believe that by giving Brandon an opportunity to work with you, that you will be enriching not just his life, but those that will be working alongside him as well. Simply put, he will be a great asset to your courtroom. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

Honorable David J. Allen
Third Judicial Circuit of Michigan, Wayne County

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

DAWN P. LUEDTKE
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.
(410) 404-2212

September 8, 2021

To Whom It May Concern:

I write in support of Brandon Goldstein, who served as a Summer Law Clerk for the Office of the Attorney General (2021), and supported my work as sole legal counsel for multiple State agencies. Mr. Goldstein's foundational basis in public policy, law, and his intellectual curiosity combined with outstanding interpersonal skills would make him a welcome addition to your chambers.

Mr. Goldstein demonstrated a consistent eagerness to assist with my work portfolio, as well as drafting opinions for the Maryland State Board of Education. Although we had to work virtually for much of our time together, we did have the opportunity to attend meetings together and collaborate in person. Regardless of format, Mr. Goldstein demonstrated effective communication skills, a solid ability to find nuance in legal issues, and provide feedback from a public policy perspective when asked. For example, I asked Mr. Goldstein to put together a spreadsheet distilling the involuntary commitment standards of all fifty states in order to assist with ongoing work by the Lt. Governor's Commission on Mental & Behavioral Health and the Maryland Behavioral Health Administration to amend Maryland's existing statute or adopt clarifying regulations on the dangerousness standard. Mr. Goldstein compiled everything, but also provided recommendations as to which State's statute might be of greatest assistance to Maryland as a model, and why. Mr. Goldstein also stepped up to ensure that a conference presentation I had prepared could be executed with his assistance by one of my colleagues at OAG when I experienced a health emergency and hospitalization. At all times he was calm, responsive, and prepared. His flexibility with assignments and timeliness and thoroughness of his work proved invaluable to me and to my clients during his time with our office.

I am certain that Mr. Goldstein has a bright future ahead of him. Completion of a judicial clerkship will facilitate the opening of additional doors for him within the legal profession, and allow him to further hone his legal skills. I truly appreciated my clerkship on the Maryland Court of Appeals, and wish the same opportunities for Mr. Goldstein as he brings his formal legal education to a close. If you should have any questions or would like to speak further about Mr. Goldstein's work, please contact me directly at dawn.luedtke@maryland.gov, or 410-404-2212.

Very truly yours,

Dawn P. Luedtke
Counsel
Maryland Center for School Safety
Active Assailant Interdisciplinary Work Group
Maryland Longitudinal Data System Center

Neal E. Devins
Sandra Day O'Connor Professor of Law
and Professor of Government

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-3845
Fax: 757-221-3261
Email: nedevi@wm.edu

April 12, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I strongly recommend Brandon Goldstein for one of your clerkship positions. Brandon is an excellent researcher and writer; he is sharp and open to criticism; he is respectful and responsive; he is bright, engaged, and a good person to bounce ideas off. In short, he has all the attributes of a great law clerk.

I know Brandon well. He was a student in my spring 2020 constitutional law class and my fall 2021 Supreme Court class. He was a summer 2020 research assistant and has continued working for me as a research assistant. Through all these contacts, I have a very good sense of Brandon. Overall, I would rank him at or near the very top of his class. I know that his grades are not nearly as good as my estimation of him and I would say that Brandon might be one of those extremely able students whose grades serve as a poor proxy for their ability to succeed.

In class, Brandon was a solid citizen. He was a good contributor who made good points in class. His degrees in political science and public policy were useful in my con law class. I was glad he applied to work for me and I hired him on the spot.

Brandon was an exceptional research assistant. He was a quick study and able to deliver high quality work in a reasonable amount of time. I was working on papers regarding changes in en banc review by federal courts of appeals and congressional participation in Supreme Court litigation. The work had an empirical bent (assessing the partisan divide in the filing of amicus briefs by members of Congress; assessing whether the recent spike up in partisan en banc rulings was attributable to changes in the en banc docket or changes in the partisan leanings of recent appeals court appointments). Brandon succeeded in both collecting the data and assessing the data. He had an eye for detail, which was critical in data collection. He is a very solid thinker and writer—and, of course, that was helpful in his analysis of what he collected.

I was very much impressed with his work and found Brandon easy to communicate with over email or zoom. I asked him to stay on as a research assistant during the 2020-21 and 2021-22 academic years. He continued and continues to do good work for me regarding federal appeals court decision-making and congressional amicus briefs.

As you can tell, I think a lot of Brandon. I think he would be a real find as a research assistant because he will perform at a level noticeably higher than his gpa. I would be happy to follow up if you have questions or would like to speak.

Sincerely,

/s/

Neal E. Devins
Sandra Day O'Connor Professor of Law
and Professor of Government

Brandon T. Goldstein

530 Market St E
Gaithersburg, MD 20878
btgoldstein@email.wm.edu

702 Glynn Springs Dr
Williamsburg, VA 23188
(301) 956 - 0543

Writing Sample

The attached writing sample is an opinion and order I wrote as a Judicial Extern for the Honorable David J. Allen, who sits as a Circuit Judge on the Third Judicial Circuit of Michigan in Wayne County.

In this case, General Motors alleged that Fiat-Chrysler (FCA, now part of Stellantis) organized and directed a massive conspiracy to commit corporate fraud, espionage, and corrupt the bargaining process. FCA and its leadership ultimately paid millions of dollars in bribes to senior UAW officials, gaining significant concessions during collective bargaining, including the role of "lead" company during the 2015 collective bargaining process. GM alleged that the ultimate goal of the scheme was to use collective bargaining to impose such high costs on GM that it would be forced to accept a proposed merger.

These civil allegations developed out of related criminal litigation in *United States v. FCA US LLC*, where the federal government charged FCA, several FCA executives, and several UAW leaders for criminal violations of the Labor Management Relations Act. GM initially filed federal RICO claims in the Eastern District of Michigan, but the court dismissed those claims. It filed the state law complaint at issue in this case, advancing eight causes of action.

Defendants FCA, Alphons Iacobelli, and Jerome Durden all filed motions for summary disposition pursuant to MCR 2.116(C)(8), Michigan's equivalent to a Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Judge Allen accepted my decision and published this draft with no alteration. The decision received extensive news coverage from *Reuters*, *Bloomberg News*, the *Detroit Free Press*, and also featured on the Sunday cover page of *The Detroit News*.

This opinion was vacated when Judge Allen granted GM's motion for reconsideration in early January 2022 based on the availability of new evidence.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GENERAL MOTORS LLC;
GENERAL MOTORS COMPANY,

Plaintiffs,

No. 20-011998-CB
Hon. David J. Allen

v.

FCA US LLC; FIAT CHRYSLER AUTOMOBILES, N.V.;
ALPHONS IACOBELLI; JEROME DURDEN,

Defendants.

OPINION AND ORDER GRANTING ALL DEFENDANTS' MCR 2.116(C)(8) MOTIONS FOR SUMMARY DISPOSITION

Introduction

Plaintiff General Motors (GM) brought this civil action against defendants Fiat-Chrysler Automobiles (FCA), Alphons Iacobelli, and Jerome Durden in late September 2020, alleging a wide-ranging corporate conspiracy that ultimately defrauded GM throughout its 2015 collective bargaining process with the UAW. GM's 84-page, 202-paragraph First Amended Complaint (FAC) presents a captivating narrative examining the actions of over a dozen characters spanning over a decade, dating all the way back to the events of the Great Recession and attending financial crisis. The FAC filed with this Court represents the culmination of over four years of litigation in state and federal courts relating to the events described therein. However, even the most enthralling drama must eventually reach a conclusion. This one is no exception.

In late November 2020, defendants FCA, Iacobelli, and Durden filed motions for summary disposition pursuant to MCR 2.116(C)(4), MCR 2.116(C)(7), and MCR 2.116(C)(8), alleging in turn that this Court lacks subject matter jurisdiction, that prior judgment in federal court precludes recovery here, and that GM's claims fail as a matter of law. While this Court is

not fully convinced that the *Garmon* rule does not preempt subject matter jurisdiction under MCR 2.116(C)(4), because this Court finds that GM's claims fail as a matter of law, this Court will grant defendants' motions for summary disposition under MCR 2.116(C)(8).

Factual and Procedural Background

As noted above, GM's complaint provides a voluminous description of events. Although the full story is wholly riveting, only information germane to this Court's decision is included herein. GM's allegations begin over a decade ago during the financial crisis triggered by the Great Recession. (FAC ¶ 39). As the auto market descended into chaos, both GM and Chrysler sustained multiple consecutive quarters of losses, and were eventually forced to initiate Chapter 11 bankruptcy proceedings within a month of each other in early 2009. (FAC ¶ 41). Around the same time, Fiat also faced declining sales and a deepening economic crisis in Europe. (FAC ¶ 43). Fiat's CEO at the time, Sergio Marchionne, concluded that in order to survive the crisis, Fiat needed to find a partner and an opportunity to expand into the U.S. marketplace. (FAC ¶¶ 43–44). Sensing an opportunity with the GM and Chrysler bankruptcies, Marchionne suggested a deal with Chrysler as one of a series of strategic partnerships with other automakers. (FAC ¶ 44). Merging with Chrysler would enable Fiat to establish its sought-after domestic footprint within the U.S. auto market. Marchionne, on behalf of Fiat, sought a connection with UAW leadership in furtherance of the effort to acquire Chrysler. (FAC ¶ 45).

Complicating his efforts, the White House had required both GM and Chrysler to restructure according to a government-approved plan as a condition for receiving emergency loans in 2008. *General Motors LLC v. FCA US LLC*, 2020 WL 3833058, at *2 (E.D. Mich. 2020) (slip copy); FAC ¶ 42. In order to secure government support, Marchionne sought the support of the UAW, specifically reaching out to General Holiefiled, head of the UAW Chrysler

department. *Id.* In the midst of active discussions with the UAW, on March 30, 2009, the government demanded that Fiat and Chrysler reach an agreement within 30 days. (FAC ¶ 47). Fiat then began making demands specifying what it would need from a new Chrysler-UAW collective bargaining agreement (CBA). Specifically, Marchionne wanted the UAW to commit to supporting its "World Class Manufacturing" (WCM) program, which would break down the rigid union job classification system and give Chrysler more flexibility in assigning jobs to different workers. (FAC ¶ 48). Marchionne also wanted to use more temporary, inexpensive "Tier Two" workers in place of standard hourly "Tier One" workers. Tier Two workers are less senior employees than those in Tier One, and have a lower wage structure, health plan, and are provided a 401(k) plan rather than a pension, making them a cheaper labor source than Tier One workers. (FAC ¶ 49).

Fiat and Chrysler ultimately did reach an acquisition deal shortly thereafter – Fiat received a 20 percent stake and the right to purchase 40 percent of the 55 percent stake that the UAW (through the UAW Trust) owned in Chrysler. (FAC ¶¶ 52–53). Fiat gave the UAW a $4.6 billion note with nine percent interest and the right to appoint a director to Chrysler's Board of Directors. (FAC ¶ 53). Fiat obtained operating control of Chrysler, and Marchionne became its new CEO. (FAC ¶ 52). In its 2009 CBA with Chrysler, the UAW agreed to both implement WCM standards and lift any cap or restraint on Tier Two workers until 2015. (FAC ¶¶ 48–49). Shortly thereafter, according to the FAC, the bribery scheme at the center of these allegations began. (FAC ¶¶ 55–58).

According to the FAC, defendants Iacobelli and Durden (among other senior FCA executives), with the knowledge, direction and approval of Marchionne and on behalf of FCA, began the "long-running scheme of improper payments to certain UAW officials, funneled

through the [UAW-Chrysler National Training Center (NTC)] and through foreign financial institutions, to influence the collective bargaining process." (FAC ¶ 58). All told, this scheme diverted more than $4.5 million from the NTC in payments and gifts to UAW officials. (FAC ¶ 59). Iacobelli, in his plea agreement, described these illegal payments as an FCA "investment" seeking return through benefits, concessions, and advantages in its labor relationship with the UAW. (FAC ¶ 60).

According to GM, the UAW made several critical concessions to FCA because of these bribes that it proceeded to deny to GM. Two are pertinent to this action. First, GM alleges that when it sought to implement its own labor efficiency program, "Global Manufacturing System" (GMS), the UAW denied it such an opportunity even though GMS "would have been on par with WCM." (FAC ¶ 73). Second, both GM and Chrysler had been subject to 25 percent caps on Tier Two workers before their respective bankruptcies. (FAC ¶ 75). After bankruptcy in 2009, both companies' CBAs were amended to lift that cap, but both GM and FCA also agreed to reinstate the cap for the 2015 CBA. (FAC ¶ 75). Each company's 2011 CBA reiterated the same commitment. (FAC ¶ 75). However, UAW leadership privately assured FCA in a "side letter" agreement that it would not insist on reinstating the Tier Two cap in 2015 while publicly continuing to claim that the cap would be reinstated. (FAC ¶ 76). In anticipation of the cap's return, GM meticulously maintained a proportion of Tier Two workers below 25 percent. (FAC ¶ 75). By 2015, these assurances resulted in a massive difference – FCA maintained a workforce composition with 42 percent Tier Two employees, while only 20 percent of GM's workforce was comprised of Tier Two employees. (FAC ¶¶ 75–76).

GM's core allegation in the FAC is that the intent of the bribery scheme was **not only to buy peace with the UAW as FCA implemented its preferred labor changes, but also to**

impose higher costs on GM, making an eventual merger between FCA and GM more attractive over time. (FAC ¶¶ 80–82). Marchionne had initially sought a Fiat-GM merger, but after GM's Board of Directors rejected his proposal, he focused on completing the Fiat-Chrysler merger. (FAC ¶ 81). Once that was complete and Marchionne became the CEO of the newly combined entity FCA, he refocused on effecting a merger with GM. (FAC ¶ 90).

In attempting to merge with GM, Marchionne and FCA initiated "Operation Cylinder," which GM describes as a "takeover" plan. (FAC ¶ 98). Although GM again rejected a proposed merger, Marchionne responded with a major publicity effort, releasing a PowerPoint promoting the benefits of consolidation of the U.S. auto market, specifically claiming over $5 billion in savings flowing from a GM-FCA merger. (FAC ¶ 101). The already-existing bribery scheme was also essential to this plan – the UAW would need to approve any potential merger. (FAC ¶ 109). Ultimately, FCA did secure UAW support for the merger. (FAC ¶ 109).

Approximately every four years, each Detroit-based automaker undergoes a collective bargaining process with the UAW, which for its part increases its leverage by ensuring that each CBA expires at the same time on the same day, necessitating simultaneous negotiations. (FAC ¶ 116). While the UAW begins negotiations with each automaker in July, it ultimately selects one automaker as the "lead" or "target" company with which to negotiate the first CBA. (FAC ¶ 117). The UAW then uses pattern bargaining, a strategy where it exerts pressure on the other automakers to base their respective CBAs on the lead company's. *See* United Auto Workers, *Bargaining 101: Pattern Bargaining* (Oct. 25, 2015) https://uaw.org/pattern-bargaining/. The UAW typically selects the largest, best-performing automaker as the lead. (FAC ¶ 121). GM was selected as the lead during the most recent negotiations in 2011, and expected to be the lead again in 2015 "based on objective factors." (FAC ¶¶ 122–23). However, the UAW unexpectedly

announced it chose FCA as the lead, a position GM alleges was bought over time through the bribery scheme. (FAC ¶ 124). FCA ultimately paid the UAW double their demand. (FAC ¶ 133). The deal ultimately contained large, unanticipated wage increases for Tier One workers and a larger ratification bonus. (FAC ¶ 131). Despite GM's attempts to "resist" the use of the FCA agreement as the "pattern," the risk of a strike was too great to bear. (FAC ¶ 134). GM largely conceded to the FCA pattern agreement, which it alleges cost over $1 billion more than it anticipated when it reached its tentative agreement before the UAW chose FCA as the lead. (FAC ¶ 136).

GM also alleges that as a part of this conspiracy, FCA placed two informants within its labor organization. (FAC ¶ 137). In addition to Iacobelli, FCA also bribed Joseph Ashton, Vice President of the UAW's GM Department, to participate in the scheme. (FAC ¶ 138–39). Ashton's early role was essential to ensure that GM did not receive comparable labor structure programs to FCA and the related cost-saving advantages they carried. (FAC ¶ 139). He later resigned from that position and accepted the UAW Trust's appointment to sit on the GM Board of Directors, where he also allegedly gave confidential labor strategy information (including performance metrics and discussions of risk regarding Tier Two employees and wage changes) to UAW and FCA officials. (FAC ¶ 141–42). In July 2015, Iacobelli "abruptly resigned from FCA" and immediately sought employment with the GM labor relations department, claiming he left FCA due to disagreement with Marchionne about their respective visions for the future of FCA. (FAC ¶ 143). GM alleges that claim to be an outright lie, claiming instead that he left FCA to infiltrate GM and provide confidential GM information to other participants in the scheme. (FAC ¶ 143). At the time GM hired Iacobelli in January 2016, it was unaware of either his true motive for leaving FCA or of his involvement in the bribery scheme. (FAC ¶ 144).

In July 2017, the government began unsealing criminal indictments related to the bribery scheme. Iacobelli and Durden were the first to be indicted, with charges following against six others shortly thereafter. (FAC ¶ 154). After following the criminal proceedings and conducting a thorough investigation, GM finally brought RICO claims in the United States District Court for the Eastern District of Michigan. (FAC ¶ 157). Although requested, the Federal District Court declined to exercise supplemental jurisdiction over GM's state law claims, and ultimately dismissed the action pursuant to a Federal Rule 12(b)(6) motion for failure to state a claim on which relief could be granted. *General Motors LLC v. FCA US LLC,* 2020 WL 3833058, at *11 (E.D. Mich. 2020) (slip copy).

Shortly thereafter, GM filed the present action in this Court. FCA sought removal to the Federal District Court, claiming fraudulent joinder and seeking severance of the claims against the non-diverse parties, Iacobelli and Durden. However, the federal court rejected those arguments and remanded the case back to this Court.

The FAC alleges eight causes of action: (1) fraud with respect to FCA, (2) fraud by omission with respect to FCA, (3) fraud with respect to Iacobelli, (4) fraud by omission with respect to Iacobelli, (5) breach of fiduciary duty with respect to Iacobelli, (6) aiding and abetting a breach of fiduciary duty with respect to FCA, (7) unfair competition with respect to FCA, and (8) civil conspiracy with respect to all defendants. (FAC ¶¶ 160-202).

Standard of Review

In a motion for summary disposition pursuant to MCR 2.116(C)(8), the Court reviews the legal sufficiency of the pleadings based on the factual allegations in the complaint. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159 (2019). The Court must decide the motion on the pleadings alone, accepting all factual allegations in the complaint as true, along with any

reasonable inferences that can be drawn from them. *State ex rel. Gurganus v. CVS Caremark Corp.*, 496 Mich. 45, 62–63 (2014). However, conclusory statements unsupported by factual allegations are insufficient to support a cause of action. *Diem v. Sallie Mae Home Loans, Inc.*, 307 Mich. App. 204, 210 (2014). The motion should be granted only if no factual development could possibly justify recovery. *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663, 672 (2006).

Generally, this standard is very easy to meet. However, in cases involving allegations of fraudulent activity, MCR 2.112(B) requires a heightened pleading standard. The circumstances constituting the fraud "must be stated with particularity." MCR 2.112(B)(1). Fraud cannot be lightly presumed; it must be clearly alleged, and "trial courts should ensure that these standards are clearly satisfied with regard to all of the elements of a fraud claim." *Cooper v. Auto Club Ins. Ass'n*, 481 Mich. 399, 414 (2008). Accordingly, it is fatal to a claim if a plaintiff does not adequately plead an element.

Discussion

1. Judge Cleland's Remand Opinion

As an initial matter, this Court finds it necessary to address Judge Cleland's opinion and order remanding the present case back to this Court from federal court. GM, in defending its allegations against C8 dismissal, relies heavily on Judge Cleland's conclusions that GM's fraud claims are "sufficient" and "not clearly invalid" and that GM's breach of fiduciary duty claim is likewise "not facially meritless" and "clear-cut." *General Motors LLC v. Iacobelli*, No. 3:20-cv-12668-RHC-APP, at 6–9 (E.D. Mich. Nov. 3, 2020) (Opinion and Order Granting Plaintiffs' Motion to Remand) (hereinafter *Cleland Opinion*). Plaintiffs' reliance on Judge Cleland's conclusions is misplaced for two reasons.

First, Judge Cleland evaluates GM's claims under the federal standard for fraudulent joinder, not MCR 2.116(C)(8), and certainly not in light of MCR 2.112(B)(1)'s heightened pleading standard. Fraudulent joinder requires the party seeking removal show that there is "no colorable basis predicting that [Plaintiffs] may recover." *Cleland Opinion* at 5. The Sixth Circuit has elaborated that the standard is "similar to, but more lenient than, the analysis applicable to a [Federal] Rule 12(b)(6) motion to dismiss." *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 433 (6th Cir. 2012). Under the federal "plausibility" pleading standard, a complaint must already satisfy a higher bar than required under MCR 2.116(C)(8) to survive a Rule 12(b)(6) motion to dismiss in federal court. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By applying a "more lenient" standard than 12(b)(6), fraudulent joinder is similar to the traditional "notice" pleading required under MCR 2.116(C)(8). Yet MCR 2.112(B) copies nearly verbatim a heightened pleading standard for fraud in the federal rules, Rule 9(b). This federal counterpart also requires plaintiffs to plead the circumstances constituting fraud with particularity.

Given that language identical to MCR 2.112(B) heightens the pleading requirements for fraud under Rule 12(b)(6), which itself is already more stringent than the standard for fraudulent joinder (and MCR 2.116(C)(8)), then Judge Cleland was clearly analyzing GM's allegations under a standard of review far more lenient than Michigan law actually requires in this instance. This is not to say that GM must surpass the federal plausibility pleading standard to plead with particularity under Michigan law, but merely that it is incorrect to assert that "nothing more [than notice pleading] is required" of it in this case. (Pl.'s Resp. to Def.'s Mot. to Dismiss, at 12) (relying on unpublished opinion to assert that notice pleading is all that is required under Michigan law, even in fraud cases).

Second, even if this Court were convinced that Judge Cleland's decision applied the correct standard of review, the Michigan Supreme Court has made clear that "[a]lthouhgh lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v. General Motors Corp.*, 469 Mich. 603, 607 (2004) (citing *Winget v. Grand Trunk W. R. Co.*, 210 Mich. 100, 117 (1920)). Accordingly, this Court is not bound by Judge Cleland's construal of Michigan law under a federal standard more lenient than required, and will conduct its own analysis of the case according to MCR 2.116(C)(8) in light of MCR 2.112(B)'s heightened pleading standard for cases involving fraud.

2. GM's Causes of Action

GM's complaint advances eight causes of action: two for fraud, two for fraud by omission, two for breach of fiduciary duty, one for unfair competition, and one for civil conspiracy tied to all of the above. Each sounds in tort law. Since "the common law doctrine of unfair competition was ordinarily limited to fraud," among other things, *Upper Peninsula Power Co. v. Village of L'Anse*, 2020 WL 6683062, at *7 (Mich. Ct. App. 2020), it would follow that if there is no legally cognizable fraud claim presented, the unfair competition claim must also fall too. Furthermore, causation and damages are elements of every cause of action alleged here. Because each cause of action insufficiently pleads causation and damages, this Court will analyze the four fraud claims together with the unfair competition claim, the two claims for breach of fiduciary duty and the civil conspiracy claim.

The common-law doctrine of fraud is well-settled in Michigan. In order to establish a claim for fraud, GM must show the following elements:

> (1) defendant made a material representation; (2) that the representation was false; (3) when the defendant made the representation, the defendant knew that

> is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage as a result.

Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C., 276 Mich. App. 146, 161 (2007) (quoting *Belle Isle Grill Corp. v. Detroit*, 256 Mich.App. 463, 477 (2003)).

Additionally, to plead fraud by omission, GM must also allege that a defendant had a legal duty to make the disclosure. *Hord v. Envtl. Rsch. Inst. of Mich.*, 463 Mich. 399, 412 (2000). Most important to this action, however, is that "[i]n a fraud . . . action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, *provided that the damages are the legal and natural consequences of the wrongful act*. . . ." *Barclae v. Zarb*, 300 Mich. App. 455, 479 (2013) (emphasis added). Likewise, a claim for breach of fiduciary duty requires a showing of "damages caused by the breach of duty." *Highfield Beach at Lake Michigan v. Sanderson*, 331 Mich. App. 636, 666 (2020).). The general rule in Michigan is that remote, contingent, or speculative damages cannot support a tort claim. *Health Call of Detroit v. Atrium Home & Health Care Servs., Inc.*, 268 Mich. App. 83, 96 (2005) (citing *Sutter v. Biggs*, 377 Mich. 80, 86 (1966)). Even assuming that GM has adequately pled every other element in all its claims, this element is where GM's claims clearly fall short.

GM relies primarily on an agreement tentatively reached, though not actually made, to rather crudely assert that it incurred "billions of dollars in labor costs" it otherwise would not have in a counterfactual world where the FCA-UAW bribery scheme did not take place. However, this is, at best, a hypothetical harm. GM constructs its claim for damages on a foundation of speculation about what *would have* occurred not only absent FCA's bribery

scheme, but also contingent on the UAW's continued support of the tentative agreement. What *actually* occurred between the 2011 CBA and the 2015 CBA, according to the FAC, is that GM managed to reduce its average hourly wage by about one dollar per hour despite the latter CBA being patterned off FCA's agreement that had been tainted by the bribery scheme. (FAC ¶ 79 & Table). Given that inflation between 2011 and 2015 was five percent[1], this Court fails to see how a decrease in average wage structure over that same period makes GM anything but *better off* than it was previously. It hypothetically may not be *as well off* as it had hoped or planned to be, but that is not a legally cognizable damage.

Moreover, even assuming that this Court could legally recognize hypothetical damage, GM has not sufficiently alleged that FCA's bribery scheme was a proximate cause of that damage, as required under Michigan law. *See Barclae*, 300 Mich. App. at 479 (requiring the fraudulent actions to be the *legal* cause of damages) (emphasis added). In fact, GM acknowledges that it was "the economic force of pattern bargaining and threat of strike" that forced GM's concession to FCA's pattern agreement. (FAC ¶ 134). Whatever FCA's material misrepresentations about the 2015 CBA negotiations may have been, the force of pattern bargaining would have guided GM's hand regardless. The same is true for Iacobelli. Whatever material misrepresentations or omissions he may have made about the bribery scheme; GM has not sufficiently alleged he caused GM any harm through his participation in it. Further, Iacobelli joined GM *after* the 2015 CBA.

Similarly, where GM asserts that FCA directed UAW to deny certain competitive advantages to GM, the allegations are conclusory. In fact, GM barely alleges any defendant caused this denial. (FAC ¶ 69) (stating that Iacobelli ensured GM was denied benefits granted to

[1] U.S. Bureau of Labor Statistics, *CPI Inflation Calculator* (Input $1.00 in Nov. 2011 and Nov. 2015) (accessed Oct. 13, 2021) https://www.bls.gov/data/inflation_calculator.htm.

FCA by continuing to direct payments to UAW leaders, without information on instruction to do so). To the extent that they do allege causation, they still do not allege any real harm. As Judge Borman pointed out, the facts, as alleged, only "indicate that the UAW would not give most of the concessions at issue to any company that was not bribing its officials." *General Motors LLC v. FCA US LLC,* 2020 WL 3833058, at *9 (E.D. Mich. 2020) (slip copy). Furthermore, in the federal criminal companion case against FCA, the court found that a class of FCA's UAW employees were not proximately harmed by the bribery convictions as necessary for restitution under the Crime Victims' Rights Act. *United States v. FCA US LLC*, 2021 WL 3032521, at *6 (E.D. Mich. 2021) (slip copy). If FCA's employees, who were deliberately restructured so as to underpay them, cannot prove that FCA's bribery scheme harmed them on this theory of liability, GM's fraud claims must fail too, and as a result its unfair competition claim also fails.

As to GM's claims for breach of fiduciary duty, they suffer from the same infirmity as the fraud claims – GM cannot show that any of defendants' actions caused it any harm. Even ignoring that GM has not initiated any cause of action against Ashton and that it hired Iacobelli after the pertinent events of the 2015 CBA process concluded, any confidential information either may have passed to FCA in violation of their fiduciary duties as corporate officers still resulted only in the same hypothetical harm as the rest of FCA's scheme. Therefore, GM's claim against Iacobelli for breach of fiduciary duty and its claim against FCA for aiding and abetting a breach of fiduciary duty must fail as well.

Finally, since claims of civil conspiracy depend upon the existence and proof of separate, actionable torts, this cause of action must fail too. *See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 257 Mich. App. 365, 384 (2003). Accordingly, all of GM's claims fail as a

matter of law because it has failed to adequately demonstrate that FCA caused it any actual, legally recognizable harm through its bribery scheme.

Jurisdiction and Discovery Motions

As a final matter, there are also pending before this Court two other outstanding matters. The first is Defendant FCA N.V.'s Motion for Summary Disposition pursuant to MCR 2.116(C)(1) and MCR 2.116(C)(8) which alleges that this Court lacks personal jurisdiction over FCA N.V. and that GM fails to adequately allege that FCA N.V. engaged in fraud, aiding and abetting of a breach of fiduciary duty, unfair competition or civil conspiracy. The second is Plaintiffs' Motion to Compel Discovery pursuant to MCR 2.309(C), MCR 2.310(C)(3) and MCR 2.313(A). Both of these pending motions are rendered moot by this Court's Opinion and Order Granting Defendants' Motions for Summary Disposition pursuant to MCR 2.116(C)(8).

It is well established that a court will not decide moot issues because it is the "principal duty of" courts "… to decide actual cases and controversies." *Federated Publications, Inc. v. City of Lansing*, 467 Mich. 98, 112 (2002), citing *Anway v. Grand Rapids R. Co.*, 211 Mich. 592, 610 (1920). The Mootness Doctrine is relied upon in order to avoid issuing opinions when there is no longer a controversy between the parties. *See In re MCI Telecom. Complaint*, 460 Mich. 396, 435 n. 13 (1999) (obligation of court to raise mootness on its own); *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 456 (2008) (deciding a moot issue is essentially issuing an advisory opinion). Due to the issuance of the Court's Opinion and Order Granting Defendants' Motions for Summary Disposition pursuant to MCR 2.116(C)(8) the above pending motions are found to be moot for consideration.

Conclusion

For the foregoing reasons, GM has not adequately alleged causation and harm as required by the causes of action it alleges. Therefore, Defendants' motions for summary disposition under MCR 2.116(C)(8) are granted in full. IT IS SO ORDERED.

Date

/s/ Honorable David J. Allen

Applicant Details

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Applicant Education

BA/BS From	**Simmons College**
Date of BA/BS	**January 2016**
JD/LLB From	**Northeastern University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12205&yr=2013**
Date of JD/LLB	**May 10, 2021**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Gabrielli National Family Law Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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Judge Elizabeth W. Hanes
United States District Court Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

August 21, 2020

Dear Honorable Judge Hanes,

I hope this letter finds you well. I am a third-year student at Northeastern University School of Law (NUSL) and I am writing to apply for the clerkship position available in your chambers for the 2021-2023 term. It would be an honor to clerk for you, as your career exemplifies public service, honor, and compassion. Your experience as an Assistant Federal Public Defender makes you an ideal mentor as I plan to pursue criminal defense after clerking. I have a strong ability to adapt to the needs of my employer, and excellent research and writing skills, which will prove essential as your clerk. My professional and academic background have prepared me to contribute substantially to the meaningful work of your chambers.

During my time at NUSL, I have had two legal internships. My first was with Judge Patti Saris in the District Court of Massachusetts. When working for Judge Saris I researched and drafted several bench memoranda on a variety of legal issues, ranging from employment claims under ERISA, to social security appeals, to habeas corpus petitions. In Judge Saris' chambers I strengthened my legal research and writing skills and became proficient at managing my time to best adapt to the Judge's court schedule. My second co-op was with the law firm Hedges & Tumposky, where I worked on motions to stay and release on behalf of incarcerated individuals who were at high risk of Covid-19-related illnesses. This past winter I participated in NUSL's Prisoners' Rights Clinic. This experience was incredibly rewarding, and, just recently, after petitioning the Parole Board for a timely decision, my client received a unanimous vote in favor of his release.

I am also a Teaching and Research Assistant for Professor Deborah Ramirez. Last summer, I worked with the Professor on a law review article, to be published later this year, which identifies gaps in the rule of law that threaten American principles of democracy. I specifically researched Special Counsel Mueller's investigations into conspiracy between the Trump Presidential campaign and Russian officials, and the duties and obligations that ought to exist between domestic campaigns and the electorate when it comes to foreign involvement in elections. I am currently working with Professor Ramirez on a second law review article, which explores potential solutions to increase police accountability and prevent municipalities from indemnifying damages owed by officers found liable for misconduct. I am also the Student Chair of NUSL's newly established Criminal Justice Task Force, where students, professors, judges, and legal professionals, come together to discuss, learn about, and address some of the most pervasive problems existing in the criminal justice system.

Prior to law school I worked for the Commonwealth's House of Representatives as Legislative Director for former Representative Cory Atkins. In that role I helped draft and advocate for legislation. I was frequently asked to synthesize information from Counsel and Committee briefings for the Representative, in order to prepare her for votes. During my time in the State House, I developed a strong appreciation for the attorneys whose legal research and writing were a necessary element of drafting all proposed legislation. I decided to go to law school so that I, too, can develop those skills and use them in public service. Working as your term clerk would be an ideal start to my legal career.

Working in your chambers would be a tremendous honor. Thank you for considering my application for a 2021-2023 term clerk.

Sincerely,

/s/Amanda Gordon

Amanda Gordon

AMANDA GORDON

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EDUCATION

Northeastern University School of Law Boston, MA
Juris Doctor Candidate May 2021
1L Social Justice Project: Proposal for a Model Debt Collection Defense Clinic with Vermont Legal Aid
Research Assistant: Professor Deborah Ramirez, Criminal Law (Summer 2019, Summer 2020)
Teaching Assistant: Professor Deborah Ramirez, Criminal Law (Winter 2020)
Clinical Work: Prisoners' Rights Clinic (Winter 2020)
Activities: Dominick L. Gabrielle National Family Law Moot Court Competition 2020; Criminal Justice Task Force, Student Chair

Simmons College Boston, MA
Bachelor of Arts in Economics, *cum laude* January 2016
Honors: Barbara Lee Family Foundation Fellowship; Dean's List
Activities: Resident Advisor; Economics Liaison; Habitat for Humanity Alternative Spring Break

EXPERIENCE

Hedges and Tumposky, LLP Boston, MA
Legal Intern Mar. - May 2020
Researched legal issues relevant to a broad range of topics including admission of evidence, prisoners' civil rights, and target standing. Wrote motions to suppress and motions in limine. Conducted intake for new clients. Assisted with firm-wide coordinated efforts to release incarcerated clients in response to the COVID-19 pandemic by writing legal motions and memoranda.

U.S. District Court of Massachusetts, Chief Judge Patti Saris Boston, MA
Legal Intern Sep. – Nov. 2019
Assisted Chief Judge Saris with cases before the Federal District Court of Massachusetts. Wrote bench memoranda in advance of hearings on a broad range of legal issues, including habeas corpus petitions, contract and tort law, intimate partner violence, and federal disability benefits. Observed seven hours of judicial proceedings weekly, including plea hearings, sentencings, and hearings on motions for summary judgement.

Office of Massachusetts State Representative Cory Atkins Boston, MA
Legislative Director Jul. 2016 – Aug. 2018
Drafted legislation, filed bills and budget amendments, analyzed the impact of proposed legislation and presented research to Representative Atkins. Produced internal memoranda for staff review and public correspondence. Prepared Representative Atkins for key legislative meetings with advocates, constituents, and government officials by providing briefings on legal policies. Wrote press releases, newsletters, and email responses on behalf of Representative Atkins.

Amanda Gordon
Northeastern University School of Law

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Margaret Woo	H	5	
Legal Research and Writing	Lilliana Mangiafico	HH	2	
Legal Skills in Social Context	Lilliana Mangiafico	HH	2	
Property	Kara Swanson	P	4	
Torts	Wendy Parmet	P	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Jessica Sibey	H	5	
Contracts	David Phillips	H	4	
Criminal Law	Deborah Ramirez	HH	4	
Legal Research and Writing	Lilliana Mangiafico	HH	2	
Legal Skills in Social Context	Lilliana Mangiafico	HH	2	

Summer Quarter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Michael Tumposky	H	4	
Independent Study- Research Assistant	Deborah Ramirez	HH	2	
Legal Research Workshop	Scott Akehurst-Moore	H	1	
Professional Responsibility	Melinda Drew	H	3	
Race and the Law	Aziza Ahmed	HH	3	

Winter 2019/2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
First Amendment	Michael Meltsner	H	3	
Independent Study- Moot Court	Libby Adler	HH	3	
Prisoners' Rights Clinic	Patricia Garin, Wallace Holohan	H	6	
Secured Transactions	Stephen McJohn	HH	3	

Grading System Description
Northeastern University School of Law uses an honorifics grading system. (HH = High Honors, H = Honors, P = Pass, MP = Marginal Pass, F = Fail)

Amanda Gordon
Simmons College
Cumulative GPA: 3.56

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Studio Art- Drawing		B+	4	
Principles of Microeconomics	Niloufer Sohrabji	B	4	
Simmons 101		P	2	
Women & Gender in the US Before 1860		A-	4	
Writing Seminar		A	2	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Elementary Italian II		B	4	
Intro to International Policy		A-	4	
Principles of Microeconomics	Carole Biewener	B+	4	
Women's Social Justice		A	4	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Calculus I		B	4	
Intermediate Italian		B-	4	
International Trade	Niloufer Sohrabji	B	4	
Women in the World Economy	Carole Biewener	A-	4	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Biology of Women		A	4	
Economic Development		B+	4	
Introductory Statistics		B	4	
World Civilization II		B+	4	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Health Economics		A-	4	
Intermediate Microeconomics		A-	4	
Intro to American Political Science		A-	4	
Women in Literature		P	4	P/F

Working for Social Justice		A	4	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intermediate Macroeconomics		A-	4	
Internship		A	8	Barbara Lee Family Foundation Fellowship
Sociology of Food		A-	4	
Theories of Justice		A-	4	

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Woodblock Printmaking Workshop		A	2	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Creative Writing: Poetry	Afaa Weaver	A	4	
Economics Internship	Carole Biewener	A	4	
Gender & Politics		A-	4	
Sociology of Love, Sex & Romance		A-	4	

August 31, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I have known Amanda Gordon since her second semester at Northeastern University School of Law (NUSL). She was a student in my criminal law class. After she received High Honors in the class, I invited Amanda to join me as Teaching and Research Assistant (TA/RA). She has gone above and beyond in the work she volunteers to do. Last summer, as my RA, Amanda contributed to a project where a team of students identified gaps in the rule of law that threaten American principles of democracy, some of which had been brought to light in the last Presidential election. Amanda researched the prosecutorial decisions of Special Counsel Mueller regarding his investigations into conspiracy, and the duties and obligations that ought to exist between domestic campaigns and the electorate when it comes to foreign involvement in elections. In response to her findings, Amanda submitted a policy proposal to implement a duty to report foreign interference in elections. Her work helped to culminate in a law review article to be published later this year. This summer, Amanda is the Student Chair of Northeastern's newly established Criminal Justice Task Force. Amanda brought together academics, attorneys, activists, judges, and students to address some of the most pervasive issues plaguing our criminal justice system. She helps monitor the Task Force's progress and ensures all members are kept informed and motivated. Amanda is also working with me to develop model state legislation that would hold police accountable for actions of misconduct. This model legislation will be used for advocacy purposes, and be published in a law review article currently being written with other NUSL students.

In addition to her work with me, Amanda also participated in NUSL's Prisoners' Rights Clinic and the Thomas M. Gabrielli Family Law Moot Court Competition. She also completed two co-ops, one with Judge Patti Saris in the Federal District Court of Massachusetts, and the other with the criminal defense firm Hedges and Tumposky. Through these experiences, Amanda has gained excellent communication skills. Over the course of knowing Amanda, she has especially honed her skills in synthesizing and summarizing large amounts of information. Alongside her rigorous extra-curricular workload, Amanda has achieved academic excellence, receiving Honors or High Honors for every class she has taken since her first semester.

Amanda has proven herself to be hardworking, diligent, and thorough. She collaborates and communicates well with others, with timely and thoughtful responses to communications. Her work is consistently well researched, and her writing skills have surpassed expectations. Amanda has been an outstanding teaching and research assistant and is among the top one percent of students I have worked with over the last ten years. It has been delightful to work with Amanda and I recommend her for a clerkship without any reservations whatsoever.

Sincerely,

Deborah Ramirez

Professor of Law

Northeastern University School of Law

416 Huntington Avenue

Boston, MA 02115

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United States District Court
John Joseph Moakley United States Courthouse
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August 25, 2020

Honorable Elizabeth W. Hanes
United States District Court
Spottswood W. Robinson III & Robert R.
Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to highly recommend Amanda Gordon for a clerkship. She was an intern in my chambers in the Fall of 2020 while attending Northeastern Law School.

Amanda engaged in multiple substantive areas of law during her co-op term. She worked on matters related to criminal and immigration habeas corpus, Social Security law, federal labor relations law, and state tort law. In a diversity case involving state law contract, conversion, and fraud claims, she prepared a memo that thoroughly analyzed a novel question concerning whether a conversion claim can be based on an equitable interest in property. In a criminal habeas corpus action, Amanda carefully considered the effects of AEDPA deference where a state supreme court opinion contained multiple rationales. She conducted thorough legal research and communicated her conclusions clearly and concisely.

Amanda's work was timely, careful and well-reasoned. She was a wonderful presence in chambers. She worked well with my law clerks and forged strong relationships with the court staff as well as her fellow interns. I recommend her for a clerkship with enthusiasm.

Very truly yours,

Patti B. Saris
U.S. District Judge

MEMORANDUM

To: Chief Judge Patti Saris, United States District Court, District of Massachusetts
From: Amanda Gordon, Legal Intern
Case: [redacted]
Date: November 14, 2019
Hearing: November 15, 2019 at 9 AM
Re: Petition for Habeas Corpus Standard of Review

INTRODUCTION

This memo will assess what standard of review the Court should adopt while considering Petitioner [redacted]'s (Petitioner) petition for habeas corpus. As the Massachusetts Supreme Judicial Court ("SJC") omitted an analysis of the prejudicial effects of failing to present a diminished capacity defense, does this Court need to conduct a de novo review of that issue, as the Magistrate Judge's Report & Recommendation ("R&R") proposed?

Petitioner was convicted of first-degree murder based on a theory of extreme atrocity or cruelty in connection with the 2005 fatal stabbing of [redacted]. Commonwealth v. [redacted], [N.E. Reporter Cite] (Mass. 2015). Petitioner brought a federal habeas corpus action under 28 U.S.C. § 2254 to challenge this conviction, arguing, as relevant here, that it should be set aside because the SJC erred in unanimously denying relief on his claim that his attorney at trial, [redacted], "was ineffective in failing to investigate his mental history." Petitioner, [N.E. Reporter Cite].

In Petitioner's brief to the SJC, he asked the court to consider whether, if a diminished capacity defense had been made, his verdict would have been the same. Brief to the SJC for the Defendant/Appellant on Appeal, S.A. I: 00081. However, the SJC did not address whether failure to raise diminished capacity prejudiced Petitioner. Justice Hines' opinion reached diminished capacity but only as to deficient performance. Under the second prong, Justice Lenk, commanding a majority of the court, reached prejudice but only discussed lack of criminal

responsibility and did not discuss diminished capacity, holding that the petitioner was not prejudiced by counsel's deficient performance, as presenting a lack of criminal responsibility defense would not have changed the jury's verdict. Thus, neither opinion considered diminished capacity under the prejudice prong.

I conclude that the SJC nonetheless "adjudicated on the merits" the prejudice prong of Petitioner's ineffective assistance of counsel claim and that this Court should therefore apply the deferential Antiterrorism and Effective Death Penalty Act ("AEDPA") standard to that claim, including the diminished capacity aspect.

ANALYSIS

In order to determine what review standard to adhere to while reviewing Petitioner's petition for habeas corpus, the Court must assess the SJC's opinion. First, I will present the two possible review standards: AEDPA and de novo, and what would trigger each one. Next, I will review whether the SJC adjudicated Petitioner's claim of ineffective assistance of counsel on the merits. If the SJC's analysis of Petitioner's ineffective assistance of counsel claim was adjudicated on the merits, the Court will review Petitioner's claim under the deferential AEDPA standard. And finally, I will consider whether the SJC majority opinion's omission of a diminished capacity defense calls for a de novo review of that specific issue by this Court. Throughout this memo, I have included excerpts from the Federal Habeas Manual that review key concepts and cases.

I. This Court will use an AEDPA review standard when all federal claims raised by the petitioner have been adjudicated on the merits by the State.

District Courts use the deferential Standard of Review prescribed in AEDPA when considering a claim within a habeas corpus petition that was adjudicated on the merits by a State

Court. When a claim raised by the petitioner has not been adjudicated on the merits by the State, the District Court will conduct a de novo review.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, federal habeas corpus relief "shall not be granted with respect to any claim that was adjudicated on the merits" by a state court unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C § 2254(d). "In this context, clearly established law signifies the holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions." Howes v. Fields, 565 U.S. 499, 505 (2012) (quotations omitted). "[A] habeas court must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102.

This standard of review is triggered by a state court adjudication on the merits, so the Court's first inquiry is whether a claim was adjudicated on the merits. As the Federal Habeas Manual describes,

> The restrictions imposed on habeas corpus by 28 U.S.C.A. § 2254(d) apply to any claim that the state court adjudicated on the merits. A state court adjudicates a claim "on the merits" for purposes of § 2254(d) when it decides the petitioner's right to relief on the basis of the substance of the federal claim advanced, rather than on a procedural or other rule precluding state court merits review. Runningeagle v. Ryan, 686 F.3d 758, 768–69 (9th Cir. 2012) (citing Harrington v. Richter, 562 U.S. 86, 98-100, 131 S.Ct. 770, 178 L.Ed. 2d 624 (2011).

FEDHABMAN § 3:7.

By contrast, when a petitioner's federal claim has not been adjudicated on the merits, the federal habeas court does not owe deference to the state court reasoning but reviews the state court adjudication de novo. Zuluaga v. Spencer, 585 F.3d 27, 29 (1st Cir. 2009) (citing to Pina v. Maloney, 565 F.3d 48, 54 (1st Cir. 2009)). As the First Circuit wrote in DiBenedetto v. Hall,

> If the state court has not decided the federal constitutional claim (even by reference to state court decisions dealing with federal constitutional issues), then we cannot say that the constitutional claim was "adjudicated on the merits" within the meaning of § 2254 and therefore entitled to the deferential review prescribed in subsection (d). This was the holding of our recent decision in Fortini v. Murphy, which forecloses the district court's approach here. 257 F.3d 39, 47 (1st Cir.2001) ("[W]e can hardly defer to the state court on an issue that the state court did not address.")[.]

272 F.3d 1 (1st Cir. 2001).

Whether the SJC adjudicated Petitioner's ineffective assistance of counsel claim on the merits is the determining factor to resolve which review standard to adopt. "A matter is 'adjudicated on the merits,' giving rise to deference under § 2254(d) of AEDPA, if there is a 'decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'" Yeboah-Sefah v. Ficco, 556 F.3d 53, 66 (1st Cir. 2009), cert. denied, 130 S. Ct. 639, 175 L. Ed. 2d 491 (2009) (quoting Teti v. Bender, 507 F.3d 50, 56–57 (1st Cir. 2007)).

II. The SJC adjudicated Petitioner's ineffective assistance of counsel claim on the merits by considering evidence presented, rather than ruling on procedure.

Strickland v. Washington provides the federal law by which to assess Petitioner's claim of ineffective assistance of counsel. See Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Strickland sets forth a bipartite test for deciding ineffective assistance of counsel claims under the U.S. Constitution. 466 U.S. at 687. The first prong calls for an assessment of the attorney's performance: the petitioner must show "that counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. Under the second

prong, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ouber v. Guarino, 293 F.3d 19, 25 (1st Cir. 2002) (quotation omitted). A petitioner needs to prevail on both prongs in order to qualify for relief. Weaver, 137 S. Ct. at 1310.

The SJC did not overlook or disregard the federal claim of ineffective assistance of counsel, so Petitioner's ineffective assistance of counsel claim was adjudicated on the merits. Justice Lenk highlighted three reasons for finding that, while Attorney's performance was deficient, Petitioner was not prejudiced by his deficiency. Lenk's reasons were (1) the incompatibility of self-defense and lack of criminal responsibility defenses; (2) mental health-based defenses would not have been substantially likely to affect Petitioner's verdict because a presentation of Petitioner's mental health would have invited evidence unfavorable to the petitioner; and (3) Petitioner was not interested in pursuing a mental health-based defense at the time of trial. These are not procedural grounds, they are based "on the substance of the claim advanced" by Petitioner. See Yeboah-Sefah, 556 F.3d at 66. Justice Lenk's adjudication of Petitioner's ineffective assistance of counsel claim was done on the merits, as both prongs of her Strickland analysis considered the record and evidence presented.

III. As the SJC adjudicated petitioner's ineffective assistance of counsel claim on the merits, this Court will presume that the prejudicial effect of foregoing a diminished capacity defense was also considered by the SJC.

As the SJC reviewed both prongs of Strickland on the merits relating to a lack of criminal responsibility defense, we turn now to whether the SJC's failure to consider a diminished capacity defense nonetheless leaves this Court with an unadjudicated federal claim. The Report and Recommendation suggests that a de novo review of the record "compels a finding of

ineffective assistance of counsel and resulting prejudice vis-à-vis the jury's assessment of Petitioner's culpability." (Dkt. No. 43, p.29)

i. The SJC adjudicated both Strickland prongs on the merits, suggesting that an AEDPA review standard is appropriate.

The Report and Recommendation cited to Rompilla to adopt de novo review and then concluded that "undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Petitioner's] culpability." (Dkt. No. 43, p.29). In Rompilla, the Court conducted a de novo review on the prejudicial impact of counsel's failure to investigate because the state court stopped their analysis after determining that the petitioner's counsel did not deficiently perform. Rompilla v. Beard, 545 U.S. 374, 390 (2005); see also Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis").

There are two issues with the R&R's reliance on Rompilla. First, Rompilla's holding on this point has been called into question by circuit courts after Harrington v. Richter.

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.
>
> Harrington v. Richter, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Post-Richter, courts have continued to apply the Wiggins principle that "[w]hen a state court relied only on one Strickland prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the Strickland prong not relied upon by the state court. The unadjudicated prong is reviewed de novo." Rayner v. Mills, 685 F.3d 631, 638 (6th Cir. 2012); accord Carter v. Duncan, 819 F.3d 931, 944–45 (7th Cir. 2016) (holding that because

the state court did not address Strickland's deficiency prong, that prong was subject to de novo review); Ferrell v. Hall, 640 F.3d 1199, 1224–27 (11th Cir. 2011); Sussman v. Jenkins, 642 F.3d 532, 534 (7th Cir. 2011) (Ripple, J.); see Salts v. Epps, 676 F.3d 468, 480 n.46 (5th Cir. 2012).

The Third Circuit recognized "the complicated question of what effect, if any, the Supreme Court's recent decision" in Richter "had on the teachings" from Wiggins, Rompilla, and Porter. McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 100 n.10 (3d Cir. 2012), cert. denied, 133 S. Ct. 999 (2013); see also Carter v. Duncan, 819 F.3d 931, 950 (7th Cir. 2016) (Easterbrook, J., concurring) ("[T]he court applies the circuit's doctrine that, because the state judiciary bypassed the 'performance' component of Strickland …, the federal judiciary's assessment is unaffected by 28 U.S.C. § 2254(d), even though the state judiciary rejected the ineffective-assistance claim on the merits by concluding that the contested aspects of counsel's performance did not prejudice [petitioner]. I think that § 2254(d) governs both elements of Strickland once the state judiciary decides an ineffective-assistance claim. Section 2254(d) applies when a state court resolves a 'claim' on the merits. Performance and prejudice are distinct issues, to be sure, but there is only one 'claim.'").

> Notwithstanding Wiggins and Rompilla, the Sixth Circuit has held that so long as the state court adjudicated the federal claim, it is not material that it did not address a specific issue related to that claim. . . . Vasquez v. Jones, 496 F.3d 564, 569–70 (6th Cir. 2007). Although the Sixth Circuit in Vasquez stated that it applies a "modified AEDPA deference" in this circumstance — "the court conducts a 'careful' and 'independent' review of the record and applicable law, but cannot reverse unless the state court's decision is contrary to or an unreasonable application of federal law" — this "modified" approach does not seem materially different from the usual § 2254(d)(1) analysis.

FEDHABMAN § 3:22.

These cases suggest that Rompilla should at least be treated with caution, particularly if applied to new situations. Even if Rompilla remains good law on this point, it addressed cases

where a state court declined to reach one prong of the Strickland analysis. This is distinct from the SJC in Petitioner's case, as Justice Lenk's majority opinion reviewed both prongs of Strickland, including assessing the prejudicial impact of Attorney's failure to investigate. Rompilla does not seem to allow de novo review here because both Strickland prongs were adjudicated on the merits and its holding—which has been put in doubt—should not extend to the present situation where an issue within one of the prongs was not reached by the SJC.

ii. The SJC implicitly assessed the prejudicial effect of not presenting a diminished capacity defense to the jury.

As aforementioned, the SJC did adjudicate Petitioner's ineffective assistance of counsel claim on the merits, but Justice Lenk does not explicitly consider a diminished capacity defense in her assessment of the prejudicial effect of Attorney's deficient performance. The next question is whether a state court's failure to address a part of a claim allows de novo review by the habeas court. Case law suggests that this Court should instead presume that the SJC adjudicated all federal claims raised by the petitioner on the merits, even if not explicitly stated as so by the State Court.

> Under Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), and Johnson v. Williams, 568 U.S. 289, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013), a federal court should presume that the federal claim (or claims) was adjudicated on the merits by the state court, and this "strong" presumption of a merits adjudication "may be rebutted only in unusual circumstances." Williams, 568 U.S. at 301, 133 S.Ct. 1088. This result follows from the Supreme Court's statement in Williams that it saw "no reason why the Richter presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims." Williams, 568 U.S. at 298, 133 S.Ct. 1088.

FEDHABMAN § 3:12. If even unaddressed claims should be given AEDPA deference, it is hard to see how an unaddressed aspect of a claim that was otherwise adjudicated should not.

The Petitioner presents both lack of criminal responsibility and diminished capacity defenses in the context of an ineffective assistance of counsel claim. As these two defenses are

clearly related, the Court should presume that the merits of an ineffective assistance of counsel claim were reviewed by the SJC, including whether Petitioner was prejudiced by Attorney's failure to present a diminished capacity defense.

The First Circuit reaffirmed this presumption of deference in Jenkins v. Bergeron, 824 F.3d 148 (1st Cir. 2016). In Jenkins, the state trial judge informed the habeas petitioner of his right to testify, the petitioner acknowledged this right, but did not take the stand. In his direct appeal, the petitioner moved for a new trial arguing that he did not knowingly and intelligently waive his right to testify. His defense attorney submitted an affidavit that stated that he and petitioner discussed whether petitioner should testify, and that he advised petitioner not to testify and did not call him as a witness. 824 F.3d at 150. Petitioner's affidavit stated that his attorney "did not explain to [him] that the decision to testify was [his] decision to make and that [he] had a constitutional right to testify if [he] so chose, but that [he] would waive that right by not testifying." 824 F.3d at 150. The trial judge denied the motion. 824 F.3d at 150. According to petitioner, the state appellate court, in denying his second appeal, overlooked his argument that his waiver of the right to testify was invalid because his attorney "unilaterally decided not to have him testify." 824 F.3d at 151. Instead, petitioner argued, the state appellate court addressed a different argument—that his waiver was not "knowing and intelligent" because he was not aware that the decision to testify was his to make. The district court denied relief.

The First Circuit affirmed, rejecting petitioner's argument that the state appellate court did not adjudicate petitioner's claim on the merits. Although the state appellate court did not explicitly discuss one argument petitioner made in support of his claim, "the Supreme Court has made clear that even 'where there is no explicit discussion of the articulated federal constitutional issue amidst the discussion of issues in the state court opinion, the federal court

must presume the federal claim was adjudicated on the merits.'" Jenkins, 824 F.3d at 152 (quoting Hodge v. Mendonsa, 739 F.3d 34, 41 (1st Cir. 2013) (citing Williams, 568 U.S. at 299-302, 133 S.Ct. 1088)). The circuit court held that petition failed to rebut the presumption that the federal claim had been adjudicated on the merits. FEDHABMAN § 3:12.

The First Circuit's decision in Jenkins leaves me with the impression that although the SJC did not explicitly mention a diminished capacity defense, their adjudication on the merits of Petitioner's ineffective assistance of counsel claim relating to a lack of criminal responsibility defense is substantially related enough to a diminished capacity defense to presume that the SJC did adjudicate Petitioner's claim on the merits. Justice Hines referenced "mental health defense[s]" and "other psychiatric defense[s]" while assessing the degree of Attorney's deficient performance by not investigating Petitioner's mental health. Petitioner, [N.E. Reporter Cite]. Justice Lenk does not mention mental health-based defenses other than lack of criminal responsibility. Despite the SJC's focus on a lack of criminal responsibility defense, it seems that this Court can presume that the SJC implicitly rejected Petitioner's diminished capacity defense argument by denying him a new trial.

CONCLUSION

While the SJC did not explicitly reach the issue of diminished capacity in their ineffective assistance of counsel analysis, this Court should find that the SJC did adjudicate the federal claim presented on the merits. As diminished capacity is so closely related to a lack of criminal responsibility defense, this Court should conduct an AEDPA review of Petitioner's petition for habeas corpus, as the petitioner did not demonstrate that the SJC did not adjudicate this claim on the merits. Thus, Petitioner would only be entitled to relief if the SJC's finding of no prejudice,

including as to diminished capacity, "was contrary to or an unreasonable application of clearly established Supreme Court precedent."

Applicant Details

First Name	**Lindsay**
Middle Initial	**A**
Last Name	**Grier**
Citizenship Status	**U. S. Citizen**
Email Address	**lindsayagrier@gmail.com**
Address	**Address** Street **4414 Locust Street** City **Philadelphia** State/Territory **Pennsylvania** Zip **19104** Country **United States**
Contact Phone Number	**7045266312**

Applicant Education

BA/BS From	**Davidson College**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 16, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal for Law and Social Change**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Edwin R. Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Finck, Kara
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Lindsay Grier
4414 Locust St., Philadelphia, PA 19104 | lgrier@pennlaw.upenn.edu | (704) 526-6312

June 14, 2021

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

I am writing to request your consideration of my application for a clerkship beginning in the fall of 2022. I am a rising third-year law student and Toll Public Interest Scholar at the University of Pennsylvania Law School.

After clerking, I plan to pursue a career as a legal services attorney. Before law school, I worked with immigrant communities facing eviction in Washington, D.C. at the Legal Aid Society of D.C. While at Penn Law, I have dedicated myself to access to justice and immigrant rights. As Field Director of International Human Rights Advocates, I support grassroots movements focused on racial justice and reproductive rights in Latin America and here in the States. A legal internship with HIAS PA and a translating role with the Transnational Legal Clinic have solidified my interest in civil legal services, especially with clients who are fleeing violence in their home countries. This summer as an intern for the Center for Appellate Litigation, I will again contribute to litigation for immigrants whose rights have been violated. I am determined to represent indigent clients in my law career.

I hope to contribute to the court's important work by engaging in deep research and legal analysis. In law school, I have worked to sharpen my research, writing, and analytical skills. As an Associate Editor of the *Journal for Law and Social Change*, I have honed my editing and time management skills. Working as a research assistant this past year for Professor Dorothy Roberts has refined my writing abilities and deepened my understanding of our legal system's inability to protect underserved communities. Finally, I have represented clients in dependency proceedings with the Interdisciplinary Child Advocacy Clinic and taken courses on constitutional criminal procedure, evidence, administrative law, and reproductive justice. Next year, I will take trial advocacy and federal courts.

I am especially interested in clerking in your chambers because I hope to return to the South after graduating from Penn Law. Both my father and grandfather spent their careers practicing law in North Carolina, and my upbringing in the South has informed my desire to establish a career of my own in the area. I especially appreciate your background in public defense, and I believe a clerkship in your chambers would help me to be a more effective advocate for my future clients.

I am enclosing my resume, transcript, and writing samples. I have also included letters of recommendation from Professor Finck (kfinck@law.upenn.edu, 215-746-2455), Professor Mayeri (smayeri@law.upenn.edu, 215-898-6728), and Professor Roberts (dorothyroberts@law.upenn.edu, 215-573-2155). Thank you for your consideration.

Respectfully,

Lindsay Grier

Lindsay Grier
4414 Locust Street Philadelphia, PA 19104
lgrier@pennlaw.upenn.edu | 704-526-6312

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA
J.D. Candidate, May 2022
Honors*:* *Toll Public Interest Scholar*, full three-year scholarship based on demonstrated commitment to public service, strong academic record, and potential for leadership in the legal community
Honorable Mention, Prosecution Attorney at 2020 Penn Law Intramural Mock Trial Tournament
Quarterfinalist, Edwin R. Keedy Cup Competition
Penn Law Representative, National Moot Court Team
Articles Editor, *Journal of Law and Social Change*
Activities*:* *Legal Representative*, Interdisciplinary Child Advocacy Clinic
Planning Committee Member, 40th Annual Edward V. Sparer Symposium, Reimagining Freedom: Abolition as a Practice
Field Director, International Human Rights Advocates
Spanish Translator, Center for Clinical Studies

Davidson College, Davidson, NC
B.A., *magna cum laude,* Hispanic Studies, May 2016
Honors*:* *Hispanic Studies Award*, award presented to senior who exceptionally integrates passion, intellectual curiosity, and cross-cultural awareness
Phi Beta Kappa
Davidson Impact Fellowship, post-graduate civic engagement fellowship
Thesis*:* "Deseo y distancia: la paradoja de Santa Teresa de Jesús"

EXPERIENCE

Center for Appellate Litigation, New York, NY — Summer 2021
Legal Intern, Immigrant Justice Project — [future position]

University of Pennsylvania, Philadelphia, PA — June 2020 – present
Research Assistant, Professor Dorothy Roberts
- Research social and legal reform around foster care abolition, specifically investigating parent organizing, transformative justice, radical social work, and family defense lawyering
- Present findings through biweekly memos to Professor Roberts and the research team
- Organized and implemented panel on foster care abolition with four experts in the field as part of the Penn Law Sparer Symposium, garnering over 300 live attendees

HIAS PA, Philadelphia, PA — Summer 2020
Legal Intern
- Prepared and submitted asylum and U-Visa applications for indigent clients who had fled from perilous country conditions
- Interviewed applicants in need of legal services for matters related to immigration

- Conducted research around re-opening procedures for USCIS and presented suggestions to supervisors on how to challenge in-person interview requirements during COVID-19

Legal Aid Society of DC, Washington, DC July 2017 – June 2019
Legal Assistant, Housing Unit
- Performed home inspections in English and Spanish for clients with severe housing code violations and reported on tenants' conditions to attorneys (over 165 inspections conducted)
- Interviewed applicants in need of legal services for matters related to rental housing, public benefits, foreclosure, domestic violence, custody, and child support (over 200 intakes conducted)
- Offered Spanish-speaking clients with case management for wraparound services, i.e. voucher placement, job applications, and housing searches
- Provided administrative support for 18 attorneys and supervised workflow for two other housing paralegals

Habitat for Humanity International, Washington, DC July 2016 – July 2017
International Shelter Initiatives Fellow
- Researched connections between shelter and gender-based issues; produced eight different reports with programmatic and advocacy strategies for Habitat's Global Programs team
- Monitored and assisted in the reporting on grants and commitments to major institutional donors, including UN Habitat, World Bank, and Inter-American Development Bank
- Coordinated Habitat's presence across 34 events at Habitat III, a UN Conference on Housing and Urban Development in Quito, Ecuador

Central American Resource Center, Washington, DC March 2017 – August 2017
Citizenship Class Teacher
- Generated lesson plans and taught classes for Central American natives pursuing US citizenship

Davidson Hispanic Studies Department, Davidson, NC September 2014 – May 2016
Associate Teacher
- Created and executed plans to lead biweekly sessions for Spanish 102 students, complementing the work they conducted in the classroom with a Davidson College professor

Freedom Global, Limuru, Kenya Summer 2015
Intern
- Developed and implemented a series of academic workshops for 72 high school girls at Uhuru Academy to support their studying for the Kenya Certificate of Secondary Education

Davidson Hispanic Studies Department, Davidson, NC Summer 2014
Researcher
- Awarded $4,800 Davidson Research Initiative Grant to pursue a ten-week independent research project
- Investigated humans' subjectivity to language and produced a 30-page policy paper suggesting innovations in how to best perceive Hispanic-American subjectivities in light of this investigation

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Unofficial Transcript and GPA for Grier, Lindsay Ann

Your complete academic record is displayed below. Please note that transcripts are not updated in real time; please select 'View grades' under 'Academic records' for the most up-to-date information.
To order an official transcript select 'Order transcripts' under 'Academic records' from the menu on the left.

Unofficial Transcript as of: 05/28/21 20:32:01 PM

AT THE LAW SCHOOL
* * * * * * * * * * **ACADEMIC PROGRAM** * * * * * * * * * * *

School: LAW
Division: LAW
Degree Program: JURIS DOCTOR
Major: LAW

* * * * * **UNIVERSITY OF PENNSYLVANIA COURSE WORK** * * * * * *

Fall 2019		**LAW**			
LAW	500	Civil Procedure (Wolff) - Sec 3	4.00	SH	B
LAW	502	Contracts (Wilkinson-Ryan) - Sec 3	4.00	SH	B
LAW	504	Torts (Baker) - Sec 3B	4.00	SH	B
LAW	510	Legal Practice Skills (Fried) - Sec 3B	4.00	SH	H
LAW	512	Legal Practice Skills Cohort (Greene)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Law) - Sec 3B	4.00	SH	CR
LAW	503	Criminal Law (Katz) - Sec 3	4.00	SH	CR
LAW	510	Legal Practice Skills (Fried) - Sec 3B	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Greene)	(0.00)	SH	CR
LAW	601	Administrative Law (Coglianese)	3.00	SH	CR
LAW	734	Reproductive Rights and Justice (Roberts)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Fall 2020		**LAW**			
LAW	631	Evidence (Rudovsky)	4.00	SH	B+
LAW	659	Employment Discrimination (Mayeri)	3.00	SH	A-
LAW	874	JLASC Independent Research Seminar	1.00	SH	CR
LAW	875	Journal of Law and Social Change - Associate Editor	1.00	SH	CR
LAW	914	Power, Injustice, and Change in America (Sutcliffe)	2.00	SH	A
LAW	941	Voting Rights Seminar (Ross)	3.00	SH	A-
LAW	999	Research Assistant (Roberts)	(2.00)	SH	NR
		Term Statistics:	14.00	SH	
		Cumulative:	46.00	SH	
Spring 2021		**LAW**			
LAW	649	Interdisciplinary Child Advocacy Clinic (Finck/deLuria/Nagda)	7.00	SH	A
LAW	696	Constitutional Criminal Procedure (Rudovsky)	3.00	SH	B+
LAW	813	Keedy Cup Preliminaries (Gowen)	1.00	SH	CR
LAW	874	JLASC Independent Research Seminar	1.00	SH	CR
LAW	875	Journal of Law and Social Change - Associate Editor	(0.00)	SH	CR
LAW	906	Crimmigration (Rodriguez)	3.00	SH	A
		Term Statistics:	15.00	SH	
		Cumulative:	61.00	SH	

* * * * * * * * * * * * **COMMENTS** * * * * * * * * * * * * *

In response to the COVID-19 pandemic, specific divisions within the University of Pennsylvania granted alternate grading options for academic terms that were impacted. See

COVID-19 Alternate Grading Policies in the Archives of University Catalogs for details.

Senior Writing Requirement - fulfilled through Voting Rights Seminar (Ross);

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020;

* * * * * * * **NO ENTRIES BEYOND THIS POINT** * * * * * * * *

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DAVIDSON

DAVIDSON COLLEGE
DAVIDSON, N.C. 28035-7154

Student No: 801335943

Date Issued: 23-OCT-2014

Record of: Lindsay Ann Grier
1000 Queens Rd W
Charlotte, NC 28207

Page: 1

Issued To: Lindsay A. Grier

Course Level: Undergraduate
Admit: Fall 2012

Current Program
Major : Hispanic Studies

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
Summer 2012		Advanced Placement				
ENG	110	Introduction to Literature	1.00	UG		
MAT	111	Calculus I - No Prev Exposure	1.00	UG		
PSY	101	General Psychology	1.00	UG		
SPA	201	Intermediate Spanish	1.00	UG		
Ehrs: 4.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2012						
REL	257	Death, Dying & Immortality	1.00	A-	3.70	
SPA	260	Spanish Conversation & Comp	1.00	A	4.00	
THE	101	Introduction to Theatre Arts	1.00	A	4.00	
WRI	101	Conceptions of the Self	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.70 GPA: 3.93						
Spring 2013						
HIS	169	Modern Africa, 1825 - present	1.00	A-	3.70	
PSY	230	Introduction to Personality	1.00	A-	3.70	
SOC	315	Media Effects	1.00	A-	3.70	
SPA	270	Intro Hispanic Lit & Culture	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.10 GPA: 3.78						
Fall 2013						
EDU	121	History of Edu Theory/Practice	1.00	A-	3.70	
ENG	204	Intro to Writing Fiction	1.00	A	4.00	
PHI	110	Problems of Philosophy	1.00	A	4.00	
SPA	344	Latino Culture in the US	1.00	A	4.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.70 GPA: 3.93						
Spring 2014						
ENV	120	Intro to Environmental Geology	1.00	B	3.00	
ENV	120	Intro to Enviro Geology Lab	0.00	LA	0.00	
HIS	163	Latin America, 1825 to Present	1.00	A	4.00	
REL	242	The Rise of Christianity	1.00	A-	3.70	
SPA	320	Span Lit Through Golden Age	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 14.70 GPA: 3.68						
Fall 2014						
IN PROGRESS WORK						
ENG	292	Documentary Film	1.00	IN PROGRESS		
PHI	250	Buddhism as Philosophy	1.00	IN PROGRESS		
SPA	360	Cultures of Southern Spain	1.00	IN PROGRESS		
SPA	375	Latin American Women Writers	1.00	IN PROGRESS		
In Progress Credits 4.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	16.00	16.00	61.20	3.825
TOTAL TRANSFER	4.00	0.00	0.00	0.000
OVERALL	20.00	16.00	61.20	3.825

********** END OF TRANSCRIPT **********

EXPLANATION OF TRANSCRIPT
Office of the Registrar
(704) 894-2227

Curriculum Since 1988

In Fall 1988, Davidson changed from a three-term to a semester calendar and changed the course numbering system and graduation requirements.

1. TWO SEMESTERS: 15 weeks each, with 45 class meetings per course and a week for examinations.
2. COURSE NUMBERING: 100-200, generally first- and second-year courses; 300-400, generally upper level courses. The letter "W" in a course number indicates a course in English composition, whatever the department; starting in 2010, the dept. code "WRI" is used for Engish Composition.
3. COURSE CREDIT: courses normally carry one course credit (valued by Davidson at four semester hours or six quarter hours of credit). Occasionally a course carries 1.5 or 2 course credits. Note that certain courses in Applied Music and Military Science and all courses in Physical Education are non-credit courses.
4. NORMAL COURSE LOAD: four or five credit courses each semester.
5. General GRADUATION REQUIREMENTS: for the classes of 1989 and 1990, 70 grade points on 35 credit courses; for the classes of 1991 and 1992, 68 grade points on 34 credit courses; for the classes of 1993 and 1994, 66 grade points on 33 credit courses; for the classes of 1995-1997, 64 grade points on 34 credit courses, for the classes of 1998 and following, 32 credit courses distributed according to the Academic Regulations.

Curriculum from 1968-1988

1. THREE TERMS: 10 weeks each, with 50 available class periods per course and four days for examinations.
2. COURSE CREDIT: all courses carry one course credit (valued by Davidson at four semester or six quarter hours). Note that certain courses in Applied Music and Military Science are non-credit courses.
3. NORMAL COURSE LOAD: three courses each term (except in 1968-70 when the Spring term load was two courses plus a required non-credit independent study).
4. General GRADUATION REQUIREMENTS: 36 courses (adjusted from 32, 33, 34, or 35 as certain non-credit independent work of 1968-70 was incorporated as credit work) with 72 grade points on those 36 courses.

Since September 1991

Grades		Grade Points per Course
A		4.0
A-		3.7
B+		3.3
B		3.0
B-		2.7
C+		2.3
C		2.0
C-		1.7
D+		1.3
D		1.0
F		0.0
P*	Pass (pass/fail)#	2.0
F1*	Failure (pass/fail)	0.0
I*	Incomplete	0.0
WA*	Authorized Withdrawal	0.0
NG*	No Grade	0.0
UG*	Ungraded Credit	0.0
LA*	Ungraded Laboratory	0.0

1971 - 1991

Grades (no numerical equivalents)		Grade Points per Course
A	Excellent	4.0
B+	Very Good	3.5
B	Good	3.0
C+	Very Satisfactory	2.5
C	Satisfactory	2.0
D	Poor	1.0
F	Failure	0.0
P*	Pass (pass/fail)***	2.0**
F1*	Failure (pass/fail)	0.0
H*	Honors	4.0
I*	Incomplete	0.0
WA*	Authorized Withdrawal	0.0
NG*	No Grade	0.0
UG*	Ungraded Credit	0.0

1968 - 1972

Grades and Numerical Equivalent		Grades Points per Course	Quality Points per Course
A+	95-100	4.5	4
A	90-94	4.0	4
B+	85-89	3.5	3
B	80-84	3.0	3
C+	75-79	2.5	2
C	70-74	2.0	2
D+	65-69	1.5	1
D	60-64	1.0	1
F	Below 60	0.0	0.0
NG	No Grade	0.0	0.0

Key

* Not used in computing grade point average

** During 1970-73, the P grade in Honors College gave 3 grade points not computed in average

*** Performance at C level or above

\# Performance at level of C- or above.

The following are symbols related to grades:

R following grade; course repeated; loss of credit; grade computed in GPA

W following grade; credit removed because Humanities program not completed; grade computed in GPA

In accordance with the Family Educational Rights and Privacy Act of 1974, as amended, this transcript cannot be released to a third party without the written consent of the student. TO TEST FOR AUTHENTICITY: The back of this transcript has an artificial watermark; hold at an angle to view. An official paper transcript will bear the Registrar's signature. Electronic copies are official only when clearly identified as delivered through securely encrypted processes. If you have questions about this document, contact the Office of the Registrar at (704) 894-2227.

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Lindsay Grier

Dear Judge Hanes:

I write to recommend highly Lindsay Grier, who is applying for a judicial clerkship upon her graduation from Penn Law School. Having taught and supervised Ms. Grier as a second-year student in the Interdisciplinary Child Advocacy Clinic, I am confident that her legal prowess, intellectual curiosity and collegiality will make her a successful judicial clerk.

The Interdisciplinary Child Advocacy Clinic at Penn Law is an intensive six credit semester long course where law students represent adolescent clients in a range of legal matters. During the semester, the students work on abuse and neglect issues, teen parent custody cases, immigration cases, special education matters, and applications for resumption of dependency jurisdiction. The Clinic is unique in its interdisciplinary focus and approach to holistic legal representation for adolescents. The law students work alongside a graduate level social work student and a Social Work Supervisor on every case. Students engage in interviewing, counseling and cross-examination simulations, in addition to writing journal reflections, client letters, and motions. It is an intense educational experience for the law students with a significant degree of supervision and oversight from the interdisciplinary professors on a weekly basis. The legal issues include child welfare, immigration, public benefits, special education and housing law. The students are expected to get up to speed quickly on all areas of the law impacting their clients' cases and to distill their research into a concrete legal strategy for their client. Ms. Grier excelled in the clinic and deservedly received an A for her work.

Ms. Grier was assigned two cases where she directly represented clients and a policy project where she worked with organizational partners including the Juvenile Law Center and Support Center for Child Advocates. In all of her casework, she had to learn family law, immigration law and dependency law regarding children in foster care. In one case, she represented a mother seeking a formal custody order for her daughter along with special findings that would allow the child to seekSpecial Immigrant Juvenile Status as an immigration remedy. In another matter, she represented a young adult who was seeking to remain in foster care to avoid imminent homelessness during the height of the pandemic. While the cases involved different areas of substantive law, Ms. Grier was able to distill the overlap between the cases of working with vulnerable populations and eliciting information from her clients in order to advocate for them effectively. Whether the advocacy was with a Family Court Judge hearing a custody matter or negotiating with the Department of Human Services about additional services for a foster youth, Ms. Grier internalized those fundamental lawyering skills to interview her clients effectively, conduct the necessary research to understand her clients' potential remedies and counsel them effectively on their options.

As a result of the pandemic, Ms. Grier handled her casework remotely through videoconferences for client meetings and court appearances. While this stymied other students in developing meaningful relationships with their clients, Ms. Grier took extra efforts to find points of connection so that her representation and advocacy for clients would not be impacted. As an example, she brainstormed a number of steps to help prepare her Spanish speaking client for an upcoming custody trial. She was sensitive not only to the issues raised by language access, but also the potential trauma that could be raised as part of the trial. She drafted interview and trial preparation plans that centered the client, thoroughly explained the proceeding and provided support and reassurance for any anxiety that the client was feeling which could ultimately impact their ability to testify credibly and persuasively. The trial was a resounding success with the Judge complimenting her client and Ms. Grier's direct examination in helping her reach the custody decision.

Throughout all of her work this semester, she was consistently prepared, thoughtful, curious and open to supervision. She consistently took advantage of opportunities for additional supervision including meeting in person at the law school and coming to office hours. It was clear from her written reflections and her participation in both seminar classes and supervision rounds that she thought deeply about the issues impacting her clients and flourished in debates about strategy and reform efforts. She never dominated discussions and was always open to both hearing and proposing alternate perspectives. In short, she was always ready to learn and challenge herself as a student.

I am confident that Ms. Grier would continue to excel as a judicial clerk and would make the most of the opportunity to continue to

Kara Finck - kfinck@law.upenn.edu - 215-746-2455

hone her research and writing skills. Please feel free to contact me directly if I can provide you with any additional information.

Sincerely,

Kara R. Finck
Practice Professor of Law
Director, Interdisciplinary Child Advocacy Clinic
Email: kfinck@law.upenn.edu
Tel: (215) 746-2455

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Lindsay Grier

Dear Judge Hanes:

I am writing to recommend enthusiastically Lindsay Grier for a clerkship. I know Lindsay well: she was a student in my Reproductive Rights and Justice class in spring 2020, she worked as one of my part-time research assistants during summer and fall 2020, and I participated in a program she organized for Penn Law's Sparer Symposium in spring 2021. Lindsay is extremely dedicated to pursuing a career as a legal services attorney, as well as the experiences to prepare her to be an outstanding advocate. Lindsay has all the skills and qualities needed to be an excellent clerk.

During summer and fall 2020, Lindsay conducted research to assist me with a book project on the child welfare system. She focused on gathering and synthesizing sources on social and legal reforms, investigating a range of approaches, including parent organizing, public interest organizations, transformative justice, radical social work, and interdisciplinary family defense lawyering. She provided me with weekly reports on her research, totalling 19 memoranda. Lindsay's work was exceptionally helpful and creative. Because the topic was on the cutting-edge of child welfare reform, Lindsay had to find not only traditional scholarly sources, but also unconventional ones, such as media stories and organizations' reports. She approached the task with enthusiasm and dedication. At the end of fall semester in 2020, she wrote an outstanding paper that summarized her research, dividing the various reform efforts she researched in helpful categories and analyzing their strengths and weaknesses. Meanwhile, during the summer, Lindsay was also working full time as a legal intern for HIAS- PA, where she prepared and submitted asylum and U-Visa applications for indigent clients, as well as assisting immigrants with other needed legal services.

During her second year in law school, Lindsay organized a panel of four experts related to her summer research with me for the annual Sparer Public Interest Symposium. I was thrilled to participate as one of the panelists. She did a remarkable job bringing the program to fruition and moderating the discussion among the panelists. The panel garnered over 300 live attendees and the video has been viewed by hundreds of people on YouTube. Based on these experiences, Lindsay took the Interdisciplinary Child Advocacy Clinic with Kara Finck during spring 2021, and was able to represent clients in dependency hearings, bringing to life the research she conducted and program she organized.

In addition to these valuable experiences, Lindsay has been very active in scholarly and public interest activities at Penn Law. She is a Toll Public Interest Scholar, a prestigious position that comes with a full three-year scholarship, awarded only to students with the most demonstrated commitment to public service, strong academic record, and potential for leadership in the legal community. She serves as an Articles Editor for the Journal of Law and Social Change, and won recognition in two advocacy competitions—honorable mention as Prosecution Attorney at the 2020 Penn Law Intramural Mock Trial Tournament and quarterfinalist in the Edwin R. Keedy Cup Competition. She also serves as a Field Director for International Human Rights Advocates.

In short, Lindsay is an extraordinary student. She is bright, highly skilled at legal research and writing, and committed to excellent work. She has also demonstrated exceptional dedication to a career in legal services and has gained a wealth of experiences to prepare her for it. I highly recommend her for a clerkship without reservation. Please feel free to contact me if you have any questions about my letter.

Sincerely,

Dorothy E. Roberts
George A. Weiss University Professor of Law & Sociology
Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights
Tel.: (215) 573-2155
E-mail: dorothyroberts@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Lindsay Grier

Dear Judge Hanes:

It is with the greatest pleasure and enthusiasm that I write to recommend Lindsay Grier for a clerkship in your chambers. Ms. Grier's intellect, research and writing abilities, and dedication to the public interest promise to make her an excellent law clerk.

After graduating magna cum laude from Davidson College with a degree in Hispanic Studies, Ms. Grier spent two years as a paralegal in the housing unit of the Legal Aid Society of Washington, DC, an experience that solidified her passion for pursuing a legal career representing clients in dire financial need. In recognition of her academic promise and commitment to a public-serving career, Ms. Grier received Penn's highly selective Toll Public Interest Scholarship, which provides three years of full tuition and a summer stipend to a small handful of students in each incoming class.

I had the privilege of coming to know Ms. Grier when she enrolled in my Employment Discrimination course in the Fall of 2020. In a class of 60 students meeting on Zoom, she stood out from the beginning of the semester for her insightful comments and questions and her deep engagement with the material. Grades in my course were based primarily on an 8-hour takeaway exam. The first part of the exam consisted of two issue-spotters that required students to identify potential legal claims, apply the law to an intricate fact pattern, and make compliance recommendations to a hypothetical employer or strategize on behalf of a potential plaintiff. The second part was a more open-ended essay question that asked students to make descriptive and normative judgments about the field of employment discrimination law. Ms. Grier's answers to both parts of the exam were solid, demonstrating a command of the doctrine and an ability to analyze and write cogently under considerable time pressure.

Ms. Grier's superb research and writing skills immediately garnered recognition when she received Honors distinction in her first-year Legal Practice Skills (LPS). Her LPS instructor describes Lindsay as "a top-tier LPS student" who "put a tremendous amount of effort into her research and analysis, and consistently submitted excellent written work." Like many talented students, Lindsay took some time to adjust to taking law school exams, but these accolades and her much-improved performance during her second year reflect her academic abilities far more accurately than her first semester grades.

Ms. Grier also hit the ground running in her co-curricular activities and clinical work. She has developed her written and oral advocacy skills through moot court competitions, advancing to the finals during her first year and receiving an honorable mention for best prosecuting attorney, and to the quarterfinals in her second year, when she also qualified for the National Moot Court Team. She has spent her summers working with HIAS PA on asylum and U-Visa cases and with the Immigrant Justice Project at the Center for Appellate Litigation in New York. She has gained valuable experience as part of the Interdisciplinary Child Advocacy Clinic, as a research assistant for Professor Dorothy Roberts, and as an Articles Editor for the Journal of Law and Social Change.

In addition to her many accomplishments, Lindsay is a wonderful human being who exudes warmth and kindness. Professor Jean Galbraith, who worked with her when Linsday volunteered in her appellate advocacy clinic as a translator for a Spanish speaking immigrant in civil detention, wrote the following: "She was beyond fantastic – so committed, kind, and able. She went with us on a full-day trip to see the client in detention, and her warm, professional manner immediately put the client at ease. Thereafter she became an integral member of our team – translating letters to and from the client for us, translating on phone calls, and even (hardest of all) translating many times on short notice during an emergency where we helped the client obtain a release in light of COVID and his health conditions. Any time we asked her to help, she was there to do so – the kind of person who responds to emails immediately with exactly what you need." These personal qualities, combined with her keen intellect, legal acumen, and writing ability, make Lindsay Grier a stellar candidate for a judicial clerkship, and her application has my strong endorsement.

Thank you very much for your time and consideration. If there is any further information or assistance I can provide, please do not hesitate to contact me.

Sincerely,

Serena Mayeri - smayeri@law.upenn.edu - 215-898-6728

Serena Mayeri
Professor of Law and History
Tel.: (215) 898-6728
E-mail: smayeri@law.upenn.edu

Lindsay Grier
4414 Locust Street, Philadelphia, PA 19104
lgrier@pennlaw.upenn.edu | 704-526-6312

June 14, 2021

To Whom It May Concern:

Enclosed please find my writing sample. It is a brief submitted for the 2021 Keedy Cup Competition at Penn Law. In my brief, I argue that the question of arbitrability is to be decided by a court, not an arbitrator, when a contract does not clearly delegate this question to an arbitrator.

This is an excerpted copy of the brief. If you would prefer to read the full version or a different writing sample, please let me know, and I will send one to you.

Thank you for your time and consideration.

Sincerely,
Lindsay Grier

QUESTION PRESENTED

Henry Schein, Inc. ("Schein") and Archer and White Sales, Inc. ("Archer") are parties to an agreement with an arbitration clause that exempts certain categories of claims from arbitration; one of these categories is actions seeking injunctive relief. When Archer sued Schein in an action seeking injunctive relief, the court was called upon to interpret their contract so as to decide whether the claim was, as Archer claimed, a claim exempt from arbitration.

The question thus became: was Archer's claim indeed exempt from arbitration? Before this question could be answered, the parties needed to know *who* should decide whether the claim was arbitrable in the first place.

Schein and Archer's agreement clearly and unmistakably delegates at least some questions of arbitrability to an arbitrator, instead of to the court. Does the express exemption in the arbitration clause, which excludes certain categories of cases from arbitration, negate the contract's otherwise clear and unmistakable delegation of arbitrability to an arbitrator?

STATEMENT OF THE CASE

A. Factual Background

For years, Respondent Archer and White Sales, Inc. ("Archer"), has sought relief on a claim whose merits have yet to be considered. JA 22. Archer, a family-owned company that distributes, sells, and services dental equipment, has asked for injunctive relief and damages following its dispute with Petitioner Henry Schein, Inc. ("Schein"), a company that distributes and manufactures dental equipment. JA 71-72. Eight years ago, Archer raised claims of Schein's violating federal and state antitrust law, anticipating that a court's ruling would allow their small business to either find much-needed relief or to move on with their lives. JA 22. The merits of Archer's antitrust claim, however, have been cast by the wayside, as Schein continues to insist that the antitrust claim should be decided by an arbitrator instead of by the court system, where it rightfully belongs. JA 72. The question of *who* should decide whether or not this claim is indeed arbitrable is what has brought us here today.

Archer executed a written agreement for product distribution with Pelton & Crane, one of Schein's predecessors-in-interest, through a 2007 Dealer Agreement (the "Dealer Agreement") that formalized the relationship between the parties. JA 88. Five years after both parties signed this agreement, Archer brought suit against Schein in Federal District Court in Texas. JA 22. The suit presented details of an alleged conspiracy between Schein and several other companies to terminate or

limit Archer's distribution rights in several states, including Oklahoma and Northwest Arkansas. JA 2.

After Archer sued, Schein invoked the Federal Arbitration Act ("FAA"), whose incorporation of the American Arbitration Association's ("AAA's") rules indicates that arbitrators themselves have the power to decide questions of arbitrability. JA 1, 16. Schein's reliance on the FAA depended on the following segment of the Dealer Agreement, which serves as the Agreement's only section addressing arbitrability and the AAA:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

JA 100. Schien moved to compel arbitration, based on the Dealer Agreement's instruction that parties shall arbitrate "in accordance with the arbitration rules" of the AAA. JA 14, 100. Archer opposed Schein's motion, calling attention to the fact that its complaint sought injunctive relief and thus fit under the Dealer Agreement's carved-out exception to claims that should be arbitrated. JA 27. This clause, broken into two parts, includes both an exemption of certain claims from arbitration and a "clear and

unmistakable" delegation of questions of arbitrability to an arbitrator. JA 100. The question becomes, how do these two clauses interact with each other? That is to say, does the exemption from arbitration negate the delegation of arbitrability to an arbitrator?

This dispute about the language in the Dealer Agreement has continued to drive this case forward, Schein alleging again and again that despite not delegating this threshold question to an arbitrator, the parties intended to delegate the threshold question to an arbitrator. Importantly, before Archer's antitrust claim can be heard, the parties need clarity on whether this claim is itself arbitrable. Before this clarity can be achieved, the parties need to know *who* decides whether the claim is arbitrable in the first place. We ask the Court to address this narrow question of who decides arbitrability, hoping it will be one small but substantial step in the direction of Archer's quest to finally have their long sought-after day in court.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fifth Circuit's holding that the question of arbitability is for the court, not an arbitrator, to decide. Because the Dealer Agreement's exemption expressly excludes certain categories of cases from arbitration, it is not clear and unmistakable that a claim falling squarely within this exception, when it necessitates an answer to the question of who decides arbitrability, should be sent to arbitration.

I. It is indisputable that this matter is one of contract interpretation. Case law instructs that to

determine *who* should answer this gateway question of arbitrability, courts should ask: is there clear and unmistakable evidence that the parties agreed to arbitrate arbitrability? *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649 (1986). The answer is simple: to read Schein and Archer's contract as a clear and unmistakable delegation of arbitrability to an arbitrator would be to read into the contract something entirely contrary to its plain meaning.

The Dealer Agreement in question exempts actions seeking injunctive relief from arbitration. The plain meaning of the clause's words indicates that when an action is excluded from arbitration, it is also excluded from being subject to the AAA rules. Thus Archer's claim, which incontrovertibly includes a request for injunctive relief, is exempt from both arbitration as well as the AAA rule that delegates arbitrability questions to an arbitrator.

Schein points to several cases in which a broad arbitration clause with an express exemption is interpreted as sending arbitrability questions to an arbitrator. None of the cases that Schein references, however, have such a clear relationship between the arbitration clause and its exemption, such that it is perfectly straightforward which actions should be sent to arbitration and which actions should be sent to a court. What's more, the proximity between the Dealer Agreement's delegation and its exemption suggests that the parties intended actions seeking injunctive relief to be exempt from arbitration as well as from the AAA rules – again, this plain meaning reading puts the question of arbitrability

squarely in the hands of the court instead of an arbitrator.

Even if the Agreement's plain meaning did not operate in such a way that its exemption negates its delegation of arbitrability to an arbitrator, the parties' silence on the matter is telling. Case law interprets silence on the question of arbitrability as giving courts, not an arbitrator, the power to rule on this issue. Because the parties could have included an express delegation clause in their agreement but chose not to do so, Archer calls on this Court to interpret the silence as the parties' not intending to send arbitrability questions to an arbitrator. To read the Agreement as mandating anything other than a delegation of arbitrability questions to the court would be to contort the Agreement's plain meaning into something that, quite frankly, it is not.

II. In addition to the contract's plain meaning pointing to a court, not an arbitrator, as the decider of arbitrability questions, policy disfavors arbitration in this case. Because in the past, this Court has interpreted broad arbitration clauses with express exemptions as sending arbitrability questions to the court, to send this question to an arbitrator would be to break with this Court's tradition and sense of consistency. Stare decisis demands a holding that is harmonious with past decisions, and sending the arbitrability question to the court would uphold that sense of uniformity.

To send this matter to an arbitrator would also be to overstep and re-write Schein and Archer's arbitration clause altogether. If this Court were to read a meaning other than the clause's plain meaning into the Agreement, lower courts would

interpret the decision as an invitation to re-write carefully negotiated and previously finalized contracts.

Also compelling are the policy determinations expressed in the FAA – most notably, in writing the statute, Congress encouraged courts to interpret arbitration clauses and imposed limits on which disputes go to arbitration. The FAA is clear that it is the court's job to determine whether or not a "valid" arbitration clause exists, and only after deciding on this issue should a matter go to arbitration. 9 U.S.C. § 2. Additionally, while Congress could have imposed more broadly sweeping mandates for arbitration in its clearly pro-arbitration statute, it explicitly set limits on what should be sent to arbitration. 9 U.S.C. § 3. Thus, per the FAA itself, this Court's ability to enforce arbitration is rightfully contingent upon the contract's instruction that arbitration is required.

In reviewing this case, the Court should respect these considerations expressed in the FAA, interpret the Dealer Agreement in a way that is consistent with its plain meaning, and allow Archer to finally move forward with its claim on the merits by deciding that this matter is one for the courts. To rule otherwise would be not only to set a dangerous precedent for future matters of contract interpretation, but also to deny Archer the opportunity to litigate its claim in a way that is consistent with the agreement that it signed.

ARGUMENT

I. THE CIRCUIT JUDGE CORRECTLY CONCLUDED THAT THE PARTIES DID NOT DELEGATE THE THRESHOLD ARBITRABILITY DETERMINATION TO AN ARBITRATOR BECAUSE THE DEALER AGREEMENT DOES NOT PROVIDE CLEAR AND UNMISTAKABLE EVIDENCE THAT THE PARTIES AGREED TO ARBITRATE.

To decide whether the question of *who* decides arbitrability falls within the parties' agreement to arbitrate, it is indisputable that the Court should use the "clear and unmistakable" standard that has been articulated as the primary means of ruling on this gateway question. In *AT&T Technologies*, the Court announced that "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies* at 649. The Court affirmed this standard in *First Options* and emphasized that in the absence of "clear and unmistakable evidence", the court can and should make its own ruling on arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). To determine whether or not this kind of evidence exists, courts treat this question as a matter of contract interpretation and turn to what the parties stipulated in their contract. *See, e.g.*, *United Steelworkers of America v. Warrior & Gulf*

Navigation Co., 363 U.S. 574, 582 (1960); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). In the Dealer Agreement between Archer and Schein, the parties' words and silence both bear on the arbitrability delegation such that it is not "clear and unmistakable" that the gateway question of arbitrability go to an arbitrator. *First Options* at 944.

A. The Dealer Agreement exempts some category of cases from arbitration, casting doubt on whether the parties intended for arbitrability to be decided by an arbitrator.

For Schein to be successful, it must convince this Court that the Dealer Agreement "clearly and unmistakably" provides for arbitration. *AT&T Technologies* At 649. Determining whether or not the parties clearly and unmistakably articulated a preference for arbitration is a question of contract interpretation. *United Steelworkers of America* at 582.

To answer the question of whether or not an arbitration clause jumps this hurdle to reach an arbitrator, this Court should – quite simply – look at the terms included in the Dealer Agreement itself. After all, it is the court's duty to "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989). Unsurprisingly, North Carolina law provides that contract interpretation should rely on the plain meaning of the words in question, maintaining that "the contract is to be interpreted as written." *Jones v. Casstevens*, 222 N.C. 411, 413 (N.C 1942). It

follows, then, that to determine whether the dispute of arbitrability falls within the agreement for arbitration, we must turn to the plain meaning of words in the arbitration clause in the Dealer Agreement itself.

1. The plain meaning of the Agreement's exemption suggests the arbitrability question should not be delegated to an arbitrator.

In cases with standard broad arbitration clauses, courts refer arbitrability questions to an arbitrator if there is "clear and unmistakable" evidence that the parties did, in fact, agree to arbitrate arbitrability. *First Options* at 944. In *Petrofac*, for example, the 3rd circuit judge referred parties to arbitration when their agreement explicitly adopted the AAA rules.[1] *Petrofac, Inc. v. DynMcDermott Petrol Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012) ("…the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."). Petrofac's contract included, in the language of the District Judge ruling on Schein and Archer's dispute, a "standard broad arbitration clause." JA 35. When there is a standard, broad clause ordering arbitration, it seems only logical to interpret the plain meaning of the contract

[1] Particularly relevant to the question of arbitrability is Rule 7(a), stating that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDICATION PROCEDURES 13 (2013), adr.org/sites/default/files/Commercial-Rules-Web.pdf.

as directing the parties to arbitrate the question of arbitrability. In Schein and Archer's Dealer Agreement, however, the clause at issue is not a standard "broad" arbitration clause. It contains an important distinction that makes its plain meaning entirely different from the clause's meaning in *Petrofac*.

In its arbitration clause, the Agreement at issue states that "any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration…" JA 100. We glean from the clause itself that the parties intended for "any dispute" to be resolved by "binding arbitration." But the instruction does not end there. The clause lays out several major exceptions for what exactly "shall be resolved by binding arbitration." The location of the parenthetical is telling: it qualifies the phrase before it, meaning it serves as a carve-out for the overarching directive for "any" dispute to be decided by arbitration.

"Actions seeking injunctive relief," according to the Agreement, are exempt from arbitration. *Id*. In its plain meaning, an "action" is "a legal proceeding by which one demands or enforces one's right in a court of justice." WEBSTER'S COLLEGIATE DICTIONARY 11 (3d ed. 1923). Thus if a party initiates a proceeding that involves, that is to say, includes, a request for injunctive relief, the action is exempt from arbitration. If the clause in the parties' Agreement had read, "actions seeking *only* injunctive relief," the exemption would solely apply to actions that did not include any other form of

relief. The clause, however, does not include the word "only," and in its absence, it is clear that as long as the action includes a request for injunctive relief, it fits squarely into this explicitly defined exception.

In this way, the clause instructs the parties to resort to arbitration only when the dispute does *not* fall within the expressly excluded categories. This exclusion distinguishes Schein and Archer's agreement from the agreement in *Petrofac*, begetting a different reading of the clause and thus a different conclusion altogether. By excluding certain categories of claims from arbitration, Archer and Schein also exclude certain categories of claims from being subject to the AAA rules. As stated by the district court ruling on Archer's Motion for Reconsideration,

> As such, there is no reason to believe that incorporation of the AAA rules, including the AAA rule that delegates the question of arbitrability to the arbitrator, should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances – when an action falls squarely within the clause excluding actions like this from arbitration.

JA 35-36.

The issue between the parties today – who should decide whether or not their dispute is arbitrable – falls directly into the exemption provided in their Agreement. Where a broad arbitration clause unequivocally commits all disputes to arbitration, such as the clause in *Petrofac*, a dispute as to

arbitrability should very likely be sent to arbitration. Archer calls on this Court, however, to interpret this arbitration clause as intending to exempt claims seeking injunctive relief from *both* arbitration *and* the AAA Rules, including the delegation of arbitrability to an arbitrator. Because actions seeking injunctive relief are excluded from arbitration and the AAA rules, the clause's exemption functions in a way that negates what would otherwise be a straightforward delegation of arbitrability to an arbitrator.

When faced with an arbitration clause exempting certain claims from arbitration in *NASDAQ*, the Second Circuit decided that "where a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute," the parties had not met the "clear and unmistakable" standard for delegating arbitrability. *NASDAQ OMX Grp., Inc. v. UBS Securities, LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014). The court in *NASDAQ* held that the delegation question arguably fell within the carve-out, so the court – not an arbitrator – was the appropriate decider of the arbitrability question. *Id*. at 1032. The court's decision in *NASDAQ* affirms the Fifth Circuit's reminder that "it is not the case that any mention in the parties' contract of the AAA rules trumps all other contract language." JA 48.

Schein contests that this particular reading of the arbitration clause waters down the parties' agreement. JA 81. For Schein, concluding that actions seeking *any* injunctive relief should be exempt from arbitration allows a party to avoid arbitration by simply tacking on a request for

injunctive relief. *Id*. To be sure, Schein is correct that this plain meaning reading does open up more categories of cases to exemption from arbitration than Schein's own proposed reading. Perhaps, if Schein is concerned about the over-inclusive nature of the clause, it should not have agreed to be a party to the Agreement at all. If a party to a contract complains after signing the contract that the contract is being enforced according to its terms, it is difficult to have sympathy for the party unless the contract formation included fraud, duress, or unconscionability. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements."). Schein is not alleging any of these defenses it its claim, so we must assume it was capable of refusing to sign the contract if it was unhappy with the terms of the agreement. In the absence of one of these defenses, then, it is inappropriate to alter the plain meaning of the contract's terms simply because one party is disgruntled that the agreement is being enforced as it was intended to be enforced.

2. The relationship between the exemption and the rest of the arbitration clause serves as evidence that the arbitrability question should be decided by the court.

An arbitration agreement with a carve-out provision is not a new phenomenon, and courts have traditionally dealt with the question of arbitrability by examining the relationship between the carve-out and the rest of the arbitration clause at issue.

Case law is clear: when a contract includes some kind of qualification to a broad arbitration clause, the AAA rules do not necessarily apply to what is contained in the carve-out or the qualification. *See, e.g.*, *Katz v. Feinberg*, 290 F.3d 95, 97 (2nd Cir. 2002) (holding that "we cannot conclude that in this case where a single agreement contains both a broadly worded arbitration clause and a specific clause assigning a certain decision to an independent accountant, that the parties' intention to arbitrate questions of arbitrability under the broad clause remains clear."); *NASDAQ* at 1035-36 (concluding intent to arbitrate arbitrability "cannot be inferred where, as here, a broad arbitration clause contains a carve-out provision that, at least arguably, covers the instant dispute.").

There are times, to be sure, when arbitration clauses will include express exemptions *and* parties will still be able to incorporate the AAA rules on the question of arbitrability. In *Oracle*, for example, the Ninth Circuit considered an arbitration clause providing that "any claim arising out of the Source License shall be settled by arbitration" with a carve-out for "any dispute related to such party's Intellectual Property Rights or with respect to [Myriad's] compliance with the TCK license." *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1071 (9th Cir. 2013). The clause at issue contained both an overarching instruction for arbitration and an explicit exemption. *Id*. Problematically, any exempted claims would be, by their very nature, claims "arising out of the Source License." Thus when Oracle argued that the agreement's carve-out should also exempt arbitrability questions from an arbitrator, it was faced with the issue that its

exempted claims were also claims they had explicitly delegated to arbitration. JA 76-77.

Here, as affirmed by the circuit court, "no such circularity exists in the contract at issue." JA 85. Instead, the Agreement's arbitration clearly divides issues between those subject to arbitration and those not subject to arbitration. JA 100. It is easier to delineate between those issues that are arbitrable and subject to the AAA rules on one hand, and those issues that are not arbitrable and not subject to the AAA rules on the other hand. The placement of the carve-out in this clause makes clear that even if a dispute is "arising under or related to" the Agreement, as long as it includes a claim for injunctive relief, it is not subject to arbitration. JA 100. This distinction from *Oracle* casts doubt on whether or not the parties intended for arbitrability questions to go to an arbitrator.

In *Crawford*, the court also interpreted a broad arbitration agreement and an explicit carve-out, deciding to send the gateway arbitrability question to an arbitrator. *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 262 (5th Cir. 2014). In this particular arbitration clause, the parties had agreed that "any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association." *Crawford* at 256. In a separate sentence, the parties declared, "nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement." *Id*. These two sentences served different functions, one dictating that "any and all" disputes should go to arbitration, the second

saying that, in addition to this standard broad arbitration clause, parties were free to seek injunctive relief. Each sentence operated as a separate entity, and the natural reading of the agreement is not that a claim seeking injunctive relief is barred from arbitration.

The arbitration clause and its exemption in Schein and Archer's Dealer Agreement are much more proximate to the invocation of the AAA rules than in *Crawford*. The arbitration clause here incorporates the AAA rules for all disputes except for disputes that fall under the expressly stated exception – the placement of the carve-out (placed directly after the "any and all" statement instead of several sentences later) suggests that the AAA rules do not apply to the exceptions listed in the carve-out. It is the syntax, according to the Fifth Circuit, that differentiates this clause from the clause in *Crawford*, indicating the parties intended to incorporate AAA rules for "all disputes *except* those under the carve-out." JA 78.

Because of the clear division between what is arbitrable and what is not, as well as the proximate relationship between the exception and the invocation of the AAA rules, Archer urges the Court to distinguish this case from *Oracle* and *Crawford*, cases under which the parties' arbitration clauses rightfully called for arbitrability questions to go to an arbitrator instead of the court. Here, because the exemption negates the instruction to send arbitrability questions to an arbitrator, the Court should decide this gateway question instead of unnecessarily sending it to an arbitrator.

B. The Agreement's silence on the issue of arbitrability should be interpreted as giving courts, not an arbitrator, the power to make the decision.

Noticeably missing from the parties' Dealer Agreement is a delegation clause, which would serve to refer questions of arbitrability to an arbitrator. A delegation clause is another type of arbitration agreement that the parties would ask the courts to enforce, understood simply as "a sentence or two assigning to the arbitrator any disputes related to the validity of the arbitration provision." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 86 (2010). The Agreement's lack of a delegation clause pertains to case law's instruction to treat silence or ambiguity as giving courts – not an arbitrator – the power to answer this gateway question of arbitrability.[2] *First Options* at 944-45. While the Dealer Agreement does address which merits-related disputes should be arbitrated, it does nothing to speak on the original question of who should decide arbitrability.

The court's treatment of silence or ambiguity in arbitration clauses might, at first glance, appear to

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[2] It is true that an agreement does not need an express delegation clause to meet the standard of clear and unmistakable evidence in favor of arbitration; the court has said that it is enough for the agreement to explicitly incorporate the AAA rules. *Petrofac, Inc.* at 675. For reasons laid out in section I(a)(1), however, the Dealer Agreement at issue fails to explicitly incorporate the AAA rules. The AAA rules do not apply to actions seeking injunctive relief, and because the question of arbitrability falls squarely within the agreement's carve-out, the Agreement does not provide for incorporation of the AAA rules into this particular dispute.

work in Schein's favor. Schein might draw on *Mitsubishi Motors Corp.*, which states that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985). This Court has said that when a contract's language gives rise to questions regarding whether or not a merits claim falls within the umbrella of arbitration, the issue should go to arbitration. *United Steelworkers of America* at 58. In this way, case law anticipates ambiguities in arbitration clauses, and makes clear that if there are reasonable doubts about how to interpret parties' intent, there should be a presumption of arbitration. *Id*.

While it is true that regarding merits-related disputes, courts interpret silence as an indication that the issue should be decided in arbitration, it is also true that the law treats silence about *who* decides arbitrability differently from how it treats silence about *other* arbitration-related disputes. *First Options* at 944-45. The arbitrability question is a very narrow one: in *First Options*, to emphasize just now narrow the question is, the Court lays out three types of disputes that can arise in arbitration disputes: 1) disagreements about the merits of the case, 2) disagreements about the arbitrability of the dispute, and 3) disagreements about who should have the power to decide arbitrability. *Id*. at 942. Courts treat each of the three categories differently, and this dispute falls only into this third category. And while it is true that silence regarding a dispute that falls into the first category (the merits of the case) should be interpreted in favor of arbitration, disputes that fall into the third category (the kind of

dispute we are dealing with today) should be interpreted in favor of the court system. *Id*. at 944-45.

Courts are hesitant to use silence as a presumption that arbitrators should decide arbitrability, "for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id*. at 945. In Schein and Archer's Dealer Agreement, there is indisputably silence on this (very narrow) question of who decides arbitrability. The Agreement states only that "any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration." JA 100. Because there is silence about who should decide the question of arbitrability, a court should be hesitant to "force unwilling parties" to arbitrate this matter. *First Options* at 945. Again, without "clear and unmistakable evidence," courts should not assume that parties agreed to arbitrate arbitrability. *First Options* at 944. The silence in this Agreement is certainly neither clear evidence nor unmistakable evidence, and it certainly does not point to arbitrating this very particular question of arbitrability.

Applicant Details

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Date of JD/LLB	**May 21, 2021**
Class Rank	**50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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April 18, 2022

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers, either August in 2022 or for your next available position. I am a graduate of the Washington University School of Law, and I am admitted to the District of Columbia Bar. My strong combination of criminal and civil law experience, from working for three District Attorney's offices and my employment law practice, makes me well suited to working in a magistrate judge's chambers.

I am particularly interested in a judicial clerkship on account of my positive experience working alongside the judges of the Colorado 5th Judicial District. The difficult but rewarding internship required me to draft written memoranda and orders for state judges under hard deadlines. Enclosed please find my résumé, transcript, and writing sample. My writing sample is the final draft of an order that I wrote for Judge Karen Ann Romeo, included with her permission. The following individuals have submitted letters of recommendation on my behalf and welcome inquiries.

Judge Karen Ann Romeo Colorado 5th Judicial District karen.romeo@judicial.state.co.us (970) 547-2634	Professor Lisa Hoppenjans Washington University School of Law lhoppenjans@wustl.edu (314) 935-8980	Yaser Ali Ali Legal PLC yali@yaseralilaw.com (321) 795-7236

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Nicholas Gunther

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EDUCATION

Washington University School of Law St. Louis, MO
J.D. | GPA: 3.61 May 2021
Honors: Dean's List; CALI: Lawyer Ethics (first in class); Dean's Service Award (192 pro bono hours)
Activities: Washington University Sexual Assault Investigation Board; Christian Legal Fellows; Honor Council Investigative Committee; Native American Law Student Association

W. P. Carey School of Business at Arizona State University Tempe, AZ
B.A. in Business Law | GPA: 4.0, *summa cum laude* May 2018
Honors: Barrett, The Honors College, Thesis: "Potential conflicts of interest in the formation and operation of Arizona School Tuition Organizations"
Internships: Ali Legal PLC (Real Estate/Trusts and Estates intern)
U.S. Department of Justice – Office of Tribal Justice (Legal Fellow)

EXPERIENCE

Alan Lescht & Associates, P.C., a premier employment litigation boutique Washington, DC
Associate Attorney Sep 2021 – Present
- Represent public and private sector employees in workplace discrimination, whistleblower, and FMLA claims
- Draft critical motions and legal briefs including oppositions to motions for summary judgment, oppositions to motions to dismiss, and motions for injunctive relief
- Draft pleadings (e.g., complaints and answers), draft discovery requests and responses, and assist with document review and production
- Second chair depositions and prepare deposition outlines and deposition exhibits
- Conference with new clients to formulate their claims and prepare key document chronologies

U.S. Department of Justice – National Courts Section Washington, DC
Legal Fellow Oct 2020 – Dec 2020
- Drafted motions and replies for federal contract disputes in the United States Court of Federal Claims
- Prepared slides for mediation presentations, summarized expert reports, and second-chaired depositions

U.S. Department of Energy – Office of the General Counsel Washington, DC
Legal Fellow Aug 2020 – Dec 2020
- Prepared legal memoranda for civilian nuclear program litigation and environmental compliance actions
- Edited congressional testimony and MOUs between the federal government, states, and private parties

Colorado 20th Judicial District – Office of the District Attorney Boulder, CO
Student Attorney May 2020 – Aug 2020
- Presented misdemeanors plea offers in a fast-paced environment when courts reopened after the COVID-19 shutdown
- Reviewed law enforcement body camera footage and developed strategies for exhibiting the footage at trial

City of St. Louis Circuit Attorney's Office St. Louis, MO
Student Attorney Jan 2020 – May 2020
- Assisted prosecutors in handling the investigation and prosecution of state-level crimes in the City of St. Louis
- Participated in case reviews and meetings with victims, lay witnesses, and professional witnesses

Colorado 5th Judicial District Breckenridge, CO
Judicial Intern May 2019 – July 2019
- Researched substantive and procedural legal issues and observed trials and courtroom proceedings
- Drafted memoranda and court orders on a variety of civil cases, including appellate decisions on county court cases

BAR ADMISSIONS:

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Washington University in St. Louis

Office of the University Registrar

Record Of: **Gunther, Nicholas** Degrees Awarded:
Student ID Number: 468426 JURIS DOCTOR MAY 21, 2021

Transcript Issued 07/09/2021 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2018

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	B+
CONTRACTS (BAKER)	LAW	W74 501H	4.0	A-
PROPERTY (SACHS)	LAW	W74 507W	4.0	B+
TORTS (TAMANAHA)	LAW	W74 515D	4.0	B+

Enrolled Units 14.0 Semester GPA 3.50 Cumulative Units 14.0 Cumulative GPA 3.50

Spring Semester 2019

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	CR
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	B+
CRIMINAL LAW (INAZU)	LAW	W74 502M	4.0	A-
NEGOTIATION (TOKARZ)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (HOLLANDER-BLUMOFF)	LAW	W74 506M	4.0	B+
CONSTITUTIONAL LAW I	LAW	W74 520P	4.0	A

Enrolled Units 16.0 Semester GPA 3.61 Cumulative Units 30.0 Cumulative GPA 3.55

Fall Semester 2019

EVIDENCE (ROSEN)	LAW	W74 547K	3.0	B+
LAWYER ETHICS (ROSEN)	LAW	W74 561D	2.0	A+
EMPLOYMENT LAW (KIM)	LAW	W74 613B	3.0	B+
IMMIGRATION LAW (MEYER)	LAW	W74 630E	3.0	A-
PRETRIAL PRACTICE: CRIMINAL	LAW	W74 658Z	3.0	P

Enrolled Units 14.0 Semester GPA 3.61 Cumulative Units 44.0 Cumulative GPA 3.57

Spring Semester 2020

AESTHETICS	PHIL	L30 438	3.0	A+
CORPORATE AND WHITE COLLAR CRIME	LAW	W74 642D	2.0	CR
NATURAL RESOURCES LAW (HEISEL)	LAW	W74 691B	2.0	CR
INTRODUCTION TO ENERGY LAW (PERRYMAN)	LAW	W74 691E	1.0	B+
THE INTERACTION OF BUSINESS, GOVERNMENT, AND PUBLIC POLICY IN A DEMOCRATIC SOCIETY (KALLEN)	LAW	W74 699B	1.0	A
PROSECUTION CLINIC	LAW	W74 731	6.0	CR

Enrolled Units 15.0 Semester GPA 3.67 Cumulative Units 59.0 Cumulative GPA 3.58

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

Office of the University Registrar

Record Of: **Gunther, Nicholas**
Student ID Number: 468426

Fall Semester 2020

SPEECH, PRESS & THE CONSTITUTION (RICHARDS)	LAW	W74 609K	3.0	B+
BANKRUPTCY (KEATING)	LAW	W74 645A	3.0	B+
CONGRESSIONAL AND ADMINISTRATIVE LAW EXTERNSHIP (VON ROHR)	LAW	W74 787D	8.0	CR

Enrolled Units 14.0 Semester GPA 3.40 Cumulative Units 73.0 Cumulative GPA 3.55

Spring Semester 2021

MEDIA LAW (HOPPENJANS)	LAW	W74 528H	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0	A
NONPROFIT PLANNING, DRAFTING & NEGOTIATION (SANT)	LAW	W74 572A	1.0	A
ARBITRATION LAW THEORY & PRACTICE (O'DONNELL)	LAW	W74 612A	3.0	A
ADVANCED TOPICS IN FOREIGN RELATIONS LAW SEMINAR (WATERS)	LAW	W76 790S	3.0	A-

Enrolled Units 13.0 Semester GPA 3.83 Cumulative Units 86.0 Cumulative GPA 3.61

Remarks

SP2020 FROM: WU ARTS & SCIENCES LAW SCHOOL ELECTIVE 3.0 UNITS
SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.

Distinctions, Prizes and Awards

SP2021 DEAN'S LIST
SP2021 DON SOMMERS AWARD IN PROFESSIONAL RESPONSIBILITY
SP2021 DEAN'S SERVICE AWARD

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

Washington University in St. Louis is accredited by the Higher Learning Commission www.hlcommission.org, and its schools by various professional accrediting bodies. The CEEB code is 6929.

Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

Washington University in St. Louis
SCHOOL OF LAW

July 28, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Nicholas Gunther

Dear Judge Hanes:

I am writing to provide my highest recommendation in support of Nicholas Gunther's clerkship application.

Nicholas was a student in my media law course this past spring and impressed me with his strong research and writing skills, thorough preparation, and thoughtful class participation. I also came to know Nicholas through discussions during office hours, where we discussed Nicholas' interest in applying the materials learned in class to his own pending Freedom of Information Act request, his passion for the First Amendment, and his interest in public service work.

As a law school clinician and experienced litigator, I structure the assignments in my media law course to emphasize real-world application of the law and the skills students will need to be successful attorneys. Rather than completing an exam or research paper, students are evaluated primarily on the basis of two legal research memoranda that require them to apply our in-class learning to identify relevant issues and then to conduct legal research to evaluate how a hypothetical client's claims or defenses would fare in a particular jurisdiction. These assignments are designed to require the type of legal research, writing, and analysis that students will need as young associates or as legal clerks.

Nicholas received one of the highest grades in the course, including receiving the only perfect score I awarded all semester on his first assignment. Nicholas' memoranda reflected excellent legal research skills, organization, analysis and writing, on par with the best young associates I have worked with in my career. In addition, Nicholas was a thoughtful and well-prepared participant in class discussions and contributed respectfully during discussions of controversial topics. His preparedness and contributions were particularly impressive given our remote learning environment.

Nicholas also exceled in other areas during his time in law school, receiving the Dean's Service Award for his extensive pro bono service. His commitment to public service is clear from his pursuit of post-graduation employment with the federal government and his work during law school with both his hometown prosecutor's office and the St. Louis Circuit Attorney's Office. In addition, last fall, Nicholas held a joint internship with the Department of Energy, Office of the General Counsel and the Department of Justice, National Courts Section.

As a former law clerk to the Hon. Susan H. Black of the Eleventh Circuit Court of Appeals and a former law firm partner at a St. Louis boutique litigation firm, Dowd Bennett LLP, I understand what is required to be a successful clerk and successful young lawyer. Nicholas has all of the traits and skills to be an outstanding addition to your chambers, and I give him my strongest recommendation without hesitation.

If you have any questions regarding Nicholas's application, please do not hesitate to contact me.

Best,

/s/

Lisa S. Hoppenjans
Director, First Amendment Clinic
Assistant Professor of Practice

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

SUMMIT COUNTY DISTRICT COURT
Karen Ann Romeo
District Court Judge
Fifth Judicial District
P.O. Box 269
Breckenridge, Colorado 80424

District Court Chambers
Honorable Karen Ann Romeo

Phone: (970) 547-2634
karen.romeo@judicial.state.co.us

RE: Letter of recommendation for Nicholas Gunther

September 26, 2019

To Whom It May Concern;

My name is Karen Romeo and I am a District Court Judge in the 5th Judicial District, which is in Breckenridge, Colorado. The purpose of this letter is to highly recommend Mr. Nicholas Gunther for any clerking opportunity.

Nicholas worked as an intern in our Combined Courts from approximately June of 2019 through August of 2019. As an intern I found Nicholas to have many strengths. He is extremely reliable and hard working. When he finished one project, he eagerly asked if there was something else he could work on. Nicholas is very bright, and with just a small amount of guidance he was able to produce some very well written and thoughtful draft orders. His research and writing skills are excellent.

One of the things I admired most about Nicholas was his desire and eagerness to meet with me and receive feedback. He asked very good questions and seemed eager to learn new things. I found him to be very mature for his age, and a very attentive and deep thinker.

Many, including myself, found Nicholas to be very likable and easy to work with. Nicholas is highly regarded here in the 5th. In sum, I think you will find that Nicholas is an excellent candidate for any clerkship.

Thank you for your time and consideration. Please feel free to contact me should you have any questions or concerns.

Sincerely,

Karen Romeo
District Court Judge 5th JD

YASER ALI LAW
WWW.YASERALILAW.COM

Yaser Ali
Ali Legal, PLLC
4500 S. Lakeshore Dr. Ste 510
Tempe, Arizona 85282

Telephone 480.442.4175
yali@yaseralilaw.com

February 20, 2020

Re: Nicholas Gunther Clerkship Application

To Whom It May Concern:

It is my pleasure to be writing this letter of recommendation for Nick Gunther.

First, allow me to introduce myself. My name is Yaser Ali. I am currently the managing attorney at a boutique estate and business planning law firm in Tempe, Arizona. I have a graduate degree in education from Harvard University, a law degree from the University of California, Berkeley, have clerked for the Honorable Judge Damon J. Keith of United States Court of Appeals for the Sixth Circuit, and worked at one of Arizona's most prestigious law firms before starting my own firm in 2015. Over the years I have interacted with hundreds of students. Nick Gunther is one of the most well-rounded and promising law students I have ever met.

I first met Nick in 2016 when he interviewed for an open legal intern position at my office. From the moment I met him, I could tell he had a promising career ahead of him. Duly impressed with his confidence, maturity, and ability to grasp sophisticated legal arguments as an undergraduate student, I offered him a position during the interview. From 2016 to 2018, during the academic year, Nick worked directly under me and has proven to be a huge asset to our firm.

One of the first projects I assigned Nick was to assist a client in the formation of an Arizona school tuition organization, a 501(c)(3) tax-exempt non-profit corporation that functions to award tuition scholarships to deserving students at private schools in the state of Arizona. Nick displayed tremendous initiative on the project as he helped develop the organization's mission and vision statements, drafted a business plan and projected budget, organizational bylaws, and prepared a draft of the IRS' onerous nearly 30-page application, along with all the requisite documents required by the state agencies. He also assisted in preparing scholarship applications and even website development for the new corporation. With Nick's help and leadership, the organization was able to raise over $300,000 in scholarships for low-income students in its first year of existence.

Nick's experience with non-profit formation and organization will be an asset in federal court should organizations appeal an IRS denial of tax-exempt status or IRS rulemaking. Nick also worked to identify ethical issues present in similar non-profits and ensure our own non-profits operated with the highest ethical standards. As a former federal clerk, I may assure you that Nick's experience with non-profit organizations and research skills will be a tremendous asset to any judicial office.

My office also prepares estate plans for a wide array of clients from different backgrounds, including individuals seeking to incorporate unique religious preferences into their wills or trusts. Being respectful of these client's desires and wishes is integral component of the service we provide. Nick participated in all components of the estate planning process from the initial meetings, to drafting of documents, and execution of plans. Nick demonstrated the utmost professionalism, very good judgment and a strong sense of responsibility when working with each of these clients. Respect is a

quality that is earned, not given, and as many of my clients would attest, Nick quickly earned this distinction.

I am fully confident in Nick's ability to persevere and succeed in his pursuit of a judicial clerkship. He is a talented writer, has a great personality, and has stellar academic credentials. When necessary, he uses all available resources to gain knowledge, understanding and insight. He is an effective communicator and carries himself with great poise when speaking or leading, all of which are necessary traits of someone who wishes to succeed as part of a judicial team.

Outside the classroom and the law office, Nick is committed to social justice and helping others. As he moves forward in his life, I am confident that Nick will be an integral part of his society and those around him, and it is in this context that he will realize his full potential to be a source of positive change as an officer of the Court.

In conclusion, Nick is a bright young man who is passionate about helping others and uniquely qualified to excel in law school and beyond. It is for these reasons that I enthusiastically recommend Mr. Nick Gunther for a judicial clerkship. If I can be of any other assistance to you please do not hesitate to contact me.

Sincerely,

Yaser Ali
Managing Attorney
Ali Legal, PLLC

Writing Sample

This writing sample is an appellate order which I prepared as a judicial intern for the Colorado 5th Judicial District, where I worked over the summer of 2019. The judge I drafted the order for has given me permission to use this document as a sample of my writing, and it is all my own work product. The order examines a novel question of Colorado landlord-tenant law. At the time of the decision, there was no case law interpreting the statute that the tenant raised as a defense to the landlord's action for eviction.

DISTRICT COURT SUMMIT COUNTY, COLORADO 501 North Park Avenue PO Box 269, Breckenridge, CO 80424 970-453-2241	
Plaintiff/Appellant: WILDERNEST PROPERTY MANAGEMENT, LLC v. **Defendants/Appellees:** CONSUELO CASHION, VICTOR JUAREZ, CLAUDIA RYKS	**▲COURT USE ONLY▲**
	Case Number: 18CV30179 Division: Courtroom:
ORDER ON APPEAL	

THIS MATTER ARISES from Plaintiff/Appellant Wildernest Property Management, LLC's (hereinafter the "Landlord") appeal from the Summit County Court decision in favor of Defendants/Appellees Consuelo Cashion, Victor Juarez, and Claudia Ryks (the "Tenants") regarding Tenants' alleged unlawful detention of the property, Landlord's alleged breach of the warranty of habitability statute, and Landlord's alleged breach of the covenant of quiet enjoyment. The Court, having reviewed the parties' Opening and Answer Briefs, the Record, and being otherwise fully apprised of the merits, enters the following Order.

I. BACKGROUND

Tenants rented a condominium (the "Premises") in Dillon, Colorado from Landlord pursuant to a Lease Agreement dated February 21, 2017, as extended under

an Addendum to Lease dated March 26, 2018. On or about July 10, 2018, the Premises was affected by a substantial leak caused by a damaged pipe in the unit located directly above the Premises. The leak was not caused by Landlord, Tenants, or anyone under their direction or control.

On July 12, 2018, Tenants notified Landlord in writing of the leak and requested alternate accommodations. On July 20, 2018 Tenants' counsel drafted and sent a letter notifying Landlord of the breach of the warranty of habitability under the Lease, specifying the uninhabitable conditions, and requesting termination of the Lease. Landlord reached out to the homeowners association's property manager Mr. Unruh. Mr. Unruh, in turn, contracted with ServPro through the homeowners association's insurance company to mitigate and reconstruct the Premises. Landlord held out the Premises as habitable in a letter sent to Tenants' counsel on July 23, 2018 asserting "All issues related to the unit have now been completely remediated by professionals" and cited the Lease as prohibiting offset and abatement of rent.

Tenants were served with a notice to pay or quit on August 8, 2018 demanding rent for August and late fees. On August 26, 2018 Tenants moved back onto the Premises. On September 4, 2018 Tenants provided Landlord with $307.19 in rent for September, with an offset for the rent paid for the portion of July after the leak was discovered. On September 21, 2018 a second notice to pay or quit was posted on the residence.

Landlord initiated the original action against Tenants by filing an action for Forcible Entry and Detainer ("FED") in the County Court for Summit County, Colorado. Landlord filed its Complaint in the County Court on October 1, 2018, alleging violations under a written lease agreement for the non-payment of rent and other terms and conditions of said lease. Tenants filed their Answer on October 15, 2018, asserting among other claims a defense and counterclaim under C.R.S. §§ 38-12-501 *et seq.* (the "Warranty of Habitability Statute") and nuisance.

Landlord requested an order requiring Tenants to deposit the full amount of unpaid rent plus late fees and liquidated damages of $6,987.49 into the court registry.

The trial court granted that motion in writing on October 22, 2018 and ordered Tenants to deposit the full amount of unpaid rent into the court registry on or before October 25, 2018 (the first day of trial). Tenants initially deposited $3,900 (two months' rent and late fees) into the court registry. Landlord objected to moving forward with the trial due to Tenants' failure to deposit the full amount ordered. The trial court allowed the trial to proceed with Tenants allowed to assert a defense to the non-payment of rent based on a breach of the warranty of habitability. At the conclusion of the first day of trial, the trial court ordered Tenants to deposit another month's rent into the court registry, which they did, bringing the total deposit to $5,700.

The continued hearing on the FED action was held on November 2, 2018 before the Honorable Edward J. Casias. In an oral ruling, the trial court found that for at least the first week after the leak was discovered, the Premises was uninhabitable and that the remediation work breached the covenant of quiet enjoyment for a portion of the time between July 11 and August 26, 2018. The trial court denied possession to Landlord and granted an abatement of rent credit to Tenants for rent from July 11 through August 26, 2018 for Landlord's breaches of the warranty of habitability and the covenant of quiet enjoyment over that period. The trial court found that the Warranty of Habitability Statute only authorized Tenants to withhold rent during the period the Premises was uninhabitable and did not allow them to offset previously paid rent. The trial court found Tenants improperly offset rent in September. The trial court found both sides did not comply with the requirements of the Warranty of Habitability Statute and declined to award attorney's fees to Tenants even though Tenants prevailed on the FED action and warranty of habitability counterclaims.

II. STANDARD OF REVIEW ON APPEAL

The district court's appellate function is to review the judgment of the county court, based upon the county court record. People v. Luna, 648 P.2d 624, 625 (Colo. 1982). When exercising appellate review, the court may affirm, reverse, remand, or modify the county court judgment, or order a trial *de novo* before the district court. See

C.R.S. § 13–6–310(2); Bovard v. People, 99 P.3d 585, 588-89 (Colo. 2004). The role of the appellate court is to review for error the trial court's ruling on issues of law and fact. Mowry v. Jackson, 343 P.2d 833, 835 (Colo. 1959).

When the district court reviews an appeal of a county court, it must first determine whether the claimed error is one of law and/or fact. Mowry v. Jackson, 343 P.2d 833, 835 (Colo. 1959). When the district court reviews an appeal of a county court decision regarding a matter of law, the appellate court is not bound by the trial court's conclusions and reviews the question of law *de novo*. Telluride Resort and Spa, L.P. v. Colo. Dept. of Rev., 40 P.3d 1260, 1264 (Colo. 2002); Radke v. Union Pac. Railroad Co., 334 P.2d 1077, 1081 (Colo. 1959).

As a matter of law, we review the interpretation of a statute *de novo*. See Gumina v. City of Sterling, 119 P.3d 527, 530 (Colo. App. 2004). In interpreting statutes, we endeavor to do so "in strict accordance with the General Assembly's purpose and intent in enacting them." In re 2000–2001 Dist. Grand Jury, 97 P.3d 921, 924 (Colo. 2004); see also Martin v. People, 27 P.3d 846, 851 (Colo. 2001). To determine that intent, we first look to the statute's plain language and, when that language is clear, we must apply the statute as written. See 2000–2001 Dist. Grand Jury, 97 P.3d at 924; Martin, 27 P.3d at 851. Additionally, "we must read and consider the statutory scheme as a whole to give consistent, harmonious and sensible effect to all its parts," Charnes v. Boom, 766 P.2d 665, 667 (Colo.1988), and must "seek to avoid an interpretation that leads to an absurd result." State v. Nieto, 993 P.2d 493, 501 (Colo. 2000).

A trial court's failure to exercise its discretion as the result of an erroneous construction of a statute or an erroneous construction of controlling precedent is tantamount to an abuse of discretion. DeBella v. People, 233 P.3d 664, 667 (Colo. 2010). A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair. See Remote Switch Sys., Inc. v. Delangis, 126 P.3d 269, 274 (Colo. App. 2005). In assessing whether a trial court's decision is manifestly unreasonable, arbitrary, or unfair, we ask not whether we would have reached a different result but, rather,